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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1316

UNITED MINE WORKERS OF AMERICA,
Petitioner,
v.
RIVERTON COAL COMPANY and
DAVISON FUEL AND DOCK COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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No. .....

UNITED MINE WORKERS OF AMERICA,
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v.

RIVERTON COAL COMPANY and
DAVISON FUEL AND DOCK COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner United Mine Workers of America prays that a Writ of Certiorari issue to review:

1. The Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered January 21, 1972 in Case No. 71-1021, styled *Riverton Coal Company and Davison Fuel and Dock Company, Plaintiffs-Appellants* v. *United Mine Workers of America, Defendant-Appellee;* and

2. The Judgment and Opinion of said United States Court of Appeals also entered January 21, 1972 in Case No. 71-1022, styled *Riverton Coal Company and Davison*

Fuel and Dock Company, Plaintiffs-Appellees v. *United Mine Workers of America, Defendant-Appellant.*[1]

The Sixth Circuit remanded the cases to the district court for entry of judgment in plaintiffs' favor for $150,312.50, with interest and costs.

Petitioner has requested the Sixth Circuit to transmit to this Court a certified record in said cases, together with proceedings in said Sixth Circuit.

OPINIONS BELOW

The district court's Opinion appears in Appendix A hereto (A. 1-60a), in the certified record and is reported in 79 LRRM 2348. The Sixth Circuit's Opinion appears in Appendix B hereto (A. 64-78a), in the certified record and is reported in 453 F.2d 1035.[2]

JURISDICTION

Judgments of the Sixth Circuit in both Cases Nos. 71-1021 and 71-1022 were entered on January 21, 1972. This Petition for Certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USCA 1254(1) and 2101(c).

QUESTIONS PRESENTED

1. Where, in an action brought by a coal producer against a labor union, both signatories to collective bar-

[1]Herein the United States Court of Appeals for the Sixth Circuit is called "*Sixth Circuit*"; the United States District Court for the Southern District of Ohio, Western Division, "*trial court*" or "*district court*"; Riverton Coal Company, "*Riverton*"; Davison Fuel and Dock Company, "*Davison*"; collectively Riverton and Davison are called "*plaintiffs*"; and United Mine Workers of America, "*UMW*" or "*petitioner*".

Unless otherwise indicated, all emphases are supplied.

[2]Though separate Judgments were entered in said cases by the Sixth Circuit (A. 78-80a), the Sixth Circuit issued a single Opinion covering both Cases Nos. 71-1021 and 71-1022.

gaining agreements in the bituminous coal industry, for damages under Section 303 of the Labor Management Relations Act, 1947, as Amended,[3] charging a violation of secondary activity thereunder and under the Act's Section 8(b)(4)(i)(ii)(A) and (B), and Section 8(e), by unlawfully coercing the signatory coal producer by strike action into signing the agreements, and a district court found and concluded that clauses in said labor agreements were work preservation clauses and therefore primary and permissive under the Act's Section 8(e), based upon undisputed facts relating to said industry's collective bargaining history and economic facts and the labor organization's historical efforts through contractual restrictions to preserve work opportunities for its members, did the Court of Appeals commit reversible error in holding that the clauses involved secondary activity banned under Section 8(e) because some coal purchased as supplemental coal from nonsignatory suppliers involved some work never performed by the coal producer's own employees, so that the challenged clauses were addressed to nonsignatory suppliers and not to the labor relations of the contracting employer's own employees?

2. Did the Court of Appeals commit reversible error when, in reversing the district court's findings and conclusions relating to the challenged clauses, it failed to find that such findings were clearly erroneous pursuant to the command of Rule 52(a), Federal Rules of Civil Procedure?

3. Under applicable law and the substantial evidence in the record, did the Court of Appeals commit reversible error in holding that UMW was responsible for the 1964 and 1966 work stoppages?

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[3]Called "Act".

4. Did the Sixth Circuit commit reversible error in holding that Davison is a proper party plaintiff to the instant actions under the Act's Section 303(b)?

5. Was there substantial evidence, under applicable law, to warrant the Court of Appeals' holdings and judgments that the defendant union had committed unfair labor practices under the Act's Sections 8(b)(4)(i), (ii)(A) and (B), 8(e) and 303 and its award of damages under the Act's Section 303?

STATUTORY PROVISIONS AND FEDERAL RULE INVOLVED

Statutory provisions involved are Sections 2, 2(13), 8(b), 8(b)(4)(i)(ii)(A) and (B), 8(d), 8(e), 301, 301(e) and 303(a) and (b) of the Labor Management Relations Act, 1947, as Amended [29 USCA 152, 152(13), 158(b), 158(b)(4)(i)(ii)(A) and (B), 158(d), 158(e), 185, 185(e) and 187(a) and (b)] (called "Act"); as well as Rule 52(a), Federal Rules of Civil Procedure.

Relevant statutory provisions appear in Appendix C hereto (A. 81-86a).

STATEMENT OF THE CASE

A. KIND OF ACTION AND THE JUDGMENTS OF THE DISTRICT COURT AND THE SIXTH CIRCUIT.

Riverton and Davison sued UMW for damages under the Act's Section 303, charging UMW committed unfair labor practices under the Act's Section 8(b)(4)(i)(ii)(A) and (B) and Section 8(e) by unlawfully coercing Riverton by strike action into signing the National Bituminous Coal Wage Agreement of 1950, As Amended Effective April 2, 1964 and April 1, 1966, respectively, containing the "Application of Contract to Coal Lands"

clause and the 80-cent Welfare Fund clause [A. 1-2a (32)].[4]

UMW denied (1) liability, (2) damages, and (3) that Davison fell within the scope of the Act's Section 303(b)'s term "Whoever" so as to be entitled to recover for any alleged injury [A. 2a (32)]. The case was tried by the district court without a jury.[5] In an October 26, 1970 Judgment, the district court was of opinion, from Findings of Fact and Conclusions of Law, that Riverton and Davison "failed to establish their alleged causes of action" against UMW under the cited statutes, ordered plaintiffs' actions dismissed with prejudice and taxed costs against plaintiffs in favor of UMW [A. 61-63a (89-90)].

The district court's judgment was based upon, *inter alia*, its conclusions that the 80-cent and coal lands clauses of the 1964-1966 Contracts did not violate the Act's Section 8(e). Plaintiffs' appeal was considered by the Sixth Circuit in Case No. 71-1021.

UMW filed a notice of appeal and cross-appeal insofar as the district court's conclusions of law and findings of fact provided that "if there be a reversal on liability" and "If the 80-cent clause did violate 8(e)" and the appellate court so held, plaintiff should recover damages from UMW, and insofar as the district court found and concluded that Davison is an employer "within the meaning of" 29 U.S.C. 152 and 187, and an affiliate of Riverton and "as such is includible within the meaning of the word 'whoever' " in Section 187 and entitled to assert damages thereunder and Section (b) of 29 U.S.C. 158; and insofar

---

[4]The abbreviation "A. ... a" refers to the Appendix to the Petition for Certiorari, while page references enclosed in parentheses refer to the Joint Appendix or to the Supplemental Appendix, both filed in the Sixth Circuit and in this Court's Clerk's office as a part of the certified record herein.

[5]United States District Judge Timothy S. Hogan presided at the trial.

also as the district court found and concluded that UMW in 1964 induced and encouraged Riverton employees "to engage in a strike and a refusal to perform services for Riverton in the course of their employment and also threatened, coerced and restrained Riverton, as those words are used in 8(b)(4)(A) and (B)", that "In concluding that the 1964 strike was union-authorized, we have applied *Coronado*, as modified by 29 U.S.C. §185(e) [see *Garmeada*, 122 F.Supp. 512 (E.D. Ky. 1954) at 517] and have applied that subsection, i.e., 29 U.S.C. §185(e)", and that "plaintiff has shown by a preponderance that the defendant, through its District 17, authorized the 1964 strike" (J.A. 91-92).

UMW's appeal was considered by the Sixth Circuit in Case No. 71-1022.

On January 21, 1972, the Sixth Circuit, in each of said cases, reversed the district court's judgment and remanded the case to the district court for entry of a judgment in favor of plaintiffs for $150,312.50, plus interest and costs (A. 78-80a).

B. FACTS AND THE DISTRICT COURT'S FINDINGS AND CONCLUSIONS CONCERNING UMW'S RESTRICTIONS ON SUBCONTRACTING.

1. The Litigants And Their Activities

The district court found, *on undisputed evidence* (A. 1-6a, 10a, 30a):

In 1956, Riverton, a bituminous coal producer [A. 2a (140)], became a wholly-owned subsidiary of Davison and continued as such until July 1, 1969 [A. 2a (100)]. Both had offices at Sunset Avenue, North Bend, Ohio [A. 2a (101-02)]. Riverton operated coal mines on leased properties in Kanawha and Fayette Counties, West Virginia, and operated coal loading docks on the Kanawha

River at Crown Hill and Marmet, West Virginia, and at all times material herein has been signatory to the National Bituminous Coal Wage Agreements (A. 6-7a).

Lewis A. Davison, Jr. was Riverton's President from 1959 or 1960 until 1969 (J.A. 183) and Davison's Vice President. Dan S. Davison was Davison's President and Riverton's Vice President. While the Davison family owns the majority interest in Davison [A. 2a (108)], the stock is owned by various shareholders (J.A. 108).

In the 1963-64 period, and preceding April, 1964, Riverton employed approximately 155 employees who worked under the 1950 Agreement, as amended effective October 1, 1958, in Riverton's West Virginia coal mines and docks and were represented by UMW (J.A. 105-06)[6]

Davison's *primary* business during 1955-68 was exclusive sales agent for Riverton's coal, receiving a commission of from 6% to 8% of coal sales prices, and keeping Riverton's books [A. 3a (101, 103, 138-39)]; it owned some coal land *but produced no coal, participated in no collective bargaining negotiations with UMW* and executed no UMW contracts [A. 3a (142, 317, 139, 318)].

As of January 1, 1964, Davison had no UMW employees in West Virginia [A. 4a (106)]. *Its ten employees at the North Bend, Ohio plant were represented by District 50, with whom it had a collective bargaining agreement* [A. 4a (106)].

Riverton owned no coal property but operated mining properties and produced coal at three mines in Kanawha and Fayette Counties, West Virginia, on land leased by Riverton from third parties. None of Riverton's leased

[6]UMW members produced from 75% to 82% of total production in the bituminous coal industry since the early 1940's [A. 4a (334)].

properties were owned by Davison [A. 3a (144, 103-04, 140, 142, 104)].[7]

At all times Riverton had sufficient coal reserves on property it leased to satisfy all orders and calls from customers—this was true quantity-wise and also grade or quality-wise. It did not increase its production to fill its orders and calls because Riverton "could not financially put in any more coal mines" [A. 4a (146, 203-04)]. Riverton's projected costs would have exceeded what it cost to acquire added coal through contracts with small operators, some union and some not, and some operating under subleases on land controlled by Riverton. *But for the financial limitations, Riverton's coal reserves were sufficient to produce all coal necessary to fill all of Riverton's and/or Davison's requirements to supply all its customers or contractees* [A. 4-5a (318-19, 919)].

Riverton did not mine all the coal it needed or that Davison needed to fulfill its contracts and it was customary "to buy supplemental coal" from various producers, some operating on Riverton's lands [A. 5a (107)]. Riverton had first refusal on coal produced by them [A. 5a (107)]. Riverton also bought coal from other producers operating on lands other than Riverton's [A. 5a (310)]. All coal so purchased, of varying qualities and grades, except for lump coal, was commingled [A. 5a (107-08)]. Most purchased coal was produced by companies not signatory to the UMW contract. *There is no evidence that "supplemental" coal purchased was purchased because Riverton-produced coal did not meet the type or quality demands of its customers. The only supplementing was in quantity.* Prior to January, 1964,

[7]While undisputed evidence shows that Davison owned *none* of Riverton's leased properties, the district court found "Some of Riverton's leased properties were owned by Davison" [A. 3a (33)].

Davison purchased coal from its wholly-owned Fields Creek Mining Co., which ceased production when its No. 3 mine worked out [A. 5a (307)].

The district court found that Riverton, during 1959-61, bought substantial amounts of coal from 32 operators (some union and some non-union) whose workers worked under less favorable conditions than did Riverton's employees who worked under UMW contracts [A. 30a (60)]; that Riverton "was doing substantial leasing (or subcontracting . .) and that the leasing bore some relationship with sub-union-standard wages and working conditions" (A. 31a); and that in 1962 and 1963, of over 2,170,000 tons of coal sold by Davison, 44 2/3%, or 967,354 tons, had been acquired by Davison and Riverton from third persons not owned or controlled by them or any affiliate; that during the nine calendar months before April, 1964, 78% of coal purchased by Riverton came from non-signatory mines and 22% came from signatory mines [A. 10a (40)].

Further, found the district court, "when the 80 cent constraint caused Riverton to cease buying from non-union operators, Riverton increased its own overall production so that the total tonnage handled by Riverton "in 1964 and 1965 compared favorably (a little less) with what was handled in 1963 and 1962" and, further, "This record does not explain why financial ability to expand production (1964-65) was missing in 1962-63" (A. 12-13a).

2. The History of Collective Bargaining in, and Relevant Economic Facts of, the Bituminous Coal Industry.

The district court found, *on undisputed evidence*, and premised upon National Bituminous Coal Wage Agreements, that collective bargaining in the bituminous coal

industry has long followed a multiemployer pattern and that UMW agreements have been on a uniform, industry-wide basis [A. 5-6a (946-53, 957-83, 1070-76, 359)]. This was true as to the 1964 and 1966 Agreements, with the exception of captive mines which use their own coal and do not purchase other coal [A. 6a (360-62)]. Similarly, the district court found, on undisputed evidence (A. 7-9a), that relevant economic facts of the bituminous coal industry showed the industry's capacity in 1958 was 625 million tons, the idle capacity was 215 million tons, while the percentage of capacity utilized was 65.7%; that 1963's capacity was 627 million tons, carried an idle capacity of 168 million tons, so that the percentage of capacity utilized was 73.2% [A. 8-9a (450-51)]; and that coal producers were able to "produce far more coal than the country could consume, up until the last six months", which was true for years prior to 1958 and 1964 [A. 8a (37-40, 450-51, 345)].

Similarly, the district court found, on undisputed evidence, that prior to the 1958 Agreement legitimate commercial practices gave rise to abuse, arising from the fact that coal produced in mines with substandard labor conditions could usually be purchased at prices below production costs in unionized mines. This resulted from lower wages paid in substandard mines and absence of contributions to any welfare fund, lax observance of safety requirements and generally lowered standards of working conditions and fringe benefits prevailing in these mines. *Before December 1, 1958, some producers, signatories to UMW's National Agreement, regularly purchased coal from substandard mines solely because of the cost differential, even though in many instances the purchasing producer had ample production capacity available to satisfy customers' requirements, and there*

were employees on lay-off status who were deprived of employment opportunities which would have been available had their employer elected to produce all the coal to be delivered to this customer rather than to purchase some from a substandard supplier [A. 9-10a (319-20)].

Wages paid in signatories' mines are materially greater than those paid by operators in non-signatory operations [A. 10a (986-92)].

3. UMW's Historical Efforts to Preserve Work Opportunities for Its Members Through Contractual Restrictions.

The district court found, on undisputed evidence, that historically and prior to the 1958 Agreement UMW sought to preserve work opportunities for its employee members by negotiating contractual restrictions upon the "contracting out" of work; the National War Labor Board directed that each UMW agreement provide that "Operators agree that they will not let any operating mines subject to this Agreement as a subterfuge" to avoid the agreement's provisions; an identical clause was contained in UMW's 1945 Agreement; the 1952 amendment to UMW's 1950 Agreement provided that "Operators signatory hereto agree that this Agreement covers the operation of all the coal lands owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this Agreement or acquired during its term which may hereafter . . be put into production," as well as the "subterfuge" provision; the 1952 Agreement's provisions were carried forward in the 1958 Agreement; and the 1964 and 1966 Agreements were expanded and provided (A. 11-12a):

> "As part of the consideration for this agreement, the Operators signatory hereto agree that this agreement covers the operation of all of the coal lands, coal producing and coal preparation

> facilities owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this agreement, or acquired during its term which may hereafter (during the term of this agreement) be put into production or use"

and, further,

> "The Operators agree that they will not lease, license or contract out any coal lands, coal producing or coal preparation facilities for the purpose of avoiding the application of this agreement or any section, paragraph or clause thereof."[6]

The district court found, too, that on December 3, 1958, UMW and Bituminous Coal Operators Association (BCOA) executed the 1958 Agreement which was subsequently signed by Southern Coal Producers Association and other producers, including Riverton, under which some 80% of total production was produced in the bituminous coal industry [A. 13a (43)]. The 1958 Agreement contained the Protective Wage Clause (PWC) which provided [A. 13a (957-59, 960)] that:

> ". . the Operators agree that all bituminous coal mined, produced, or prepared by them, or any of them, or procured or acquired by them, or any of them under a subcontract arrangement, shall be or shall have been mined or produced under terms and conditions which are favorable to the employees as those provided for in this Contract."

A further provision of the clause provided [A. 13a (960)]:

> ". . any operator signatory hereto who is a party to any agreement inconsistent with the obligations assumed hereunder shall not maintain such inconsistent agreement in effect beyond the first date at which such agreement may be terminated by him in accordance with its terms."

[6] A. 11a (451, 940-42; 452, 943-44; 453, 944-46; 453-54, 946-47; 454-55, 947-53; 608, 612, 469-71, 1070-76).

On August 27, 1963, the National Labor Relations Board's Chairman and two members found the 1958 Agreement's PWC banned by the Act's Section 8(e) [*Raymond O. Lewis, et al.*, 144 NLRB 228 (August 27, 1963)]. On December 12, the Board, on reconsideration *en banc*, officially recorded its inability to arrive at a majority decision [A. 18-19a (48-49)].[9]

Then, because of NLRB's holding that PWC violated the law, yet ever mindful of the need to protect the work opportunities of UMW members by contractual provisions, UMW suggested to coal operators that UMW ought to have a contractual clause providing for $1.00 payments into the Welfare Fund; the operators rejected this suggestion and finally agreed on 80-cents a ton (A. 19a). *Contract signatories signed for "all of the production and acquired production"* (J.A. 331).

4. The District Court Found and Concluded that PWC, the 80-cent Clause and the Coal Lands Clause of the 1964 and 1966 Agreements Sought to Protect the Jobs and Work of Signatory Employees and to Maintain the Welfare Fund's Integrity, and Were Permissive Under the Act's Section 8(e).

Premised upon undisputed evidence,[10] the district court found the 1964 Agreement's 80-cent clause[11] was the

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[9]Subsequent proceedings before NLRB and the United States Court of Appeals for the District of Columbia are discussed, *post*, pp. 31-34.

[10]J.A. 324-36, 343-46.

[11]The 80-cent clause in the 1964 and 1966 Agreements provides that (J.A. 606-07):

"During the life of this agreement there shall be paid into such Fund by each Operator signatory hereto the sum of forty cents (40¢) per ton of two thousand (2,000) pounds on each ton of bituminous coal produced by such Operator for use or for sale. On all bituminous coal procured or acquired by any signatory Operator for use or for sale, (i.e., all bituminous coal other than that produced by such signatory Operator) there shall, during the life of this Agreement, be paid into such Fund by each Operator signatory hereto or by any subsidiary or affiliate of such Operator signatory hereto the sum of eighty cents (80¢) per ton of two thousand (2,000) pounds on each ton of such bituminous coal so procured or acquired on which the aforesaid sum of forty cents (40¢) per ton had not been paid into said Fund prior to such procurement or acquisition."

"direct and inseparable result of an effort by the Union to devise a 'legal' substitute and 'collectively bargain' it through", and "The result was the inclusion of the 80-cent clause and 'application to coal lands' clause in the contract" [A. 16a (46)]; that the challenged clauses "were bargained for by UMW in a sincere effort to stop the employers' practice—which was prevalent—of avoiding the burdens (to the employer) of a union contract by the legalistic subterfuge of 'leasing' or 'dummying' " [A. 12a (42)] because the contractual provisions up to 1964 "did not do much good" [A. 12a (42)]; that prior to and when PWC was negotiated in 1958, and "to and at the times the 80-cent clause was negotiated (at the multi-employer levels) in 1964 and 1966 *'subcontracting' . . was a real and not fancied problem"*; that *"The primary target of the union—intent—in bargaining out PWC was unquestionably subcontracting"*; that *"The clause was directed at (1) job security, (2) welfare fund integrity; that whatever the unit, that was the real primary intent"*; and *"the primary purposes of the somewhat enforced substitute (80¢ clause) were the same as the original (PWC), i.e., to protect the jobs and work of signatory employees and maintain the integrity of the Welfare Fund"* [A. 19-20a (49)]; and that UMW's purpose and intent in negotiating the clause "was primary and not secondary" [A. 12a (42)].

The district court held "neither PWC nor the 80-cent clause ran afoul of 8(e)"; that their purpose *clearly* was "to tackle in a successful way a legitimate problem of subcontracting and work preservation which had existed for decades and had been attacked for decades in unsuccessful contractual methods"; that a secondary effect of each clause "was the protection of the Welfare Fund—clearly a legitimate primary (in a labor sense) target";

that though a "secondary effect" was unionization of some non-union employers, it was "foreseeable and in that sense was a purpose at the time the clauses were negotiated"; and that the secondary purpose was an incident to the primary purpose, which was work preservation, and "obvious on the record that the unionization effect was a matter of choice, even to neutral employers", not a matter of compulsion [A. 55a (83-84)]. Specifically, with reference to Riverton, the district court concluded, *"On this record, one could only conclude that the 80-cent clause did exactly what it was designed to do—it resulted in the employer producing more with his own employees than he ever had before by substantial percentages"* [A. 55a (84)], noting "This record does not explain why financial ability to expand production (1964-65) was missing in 1962-63" [A. 13a (42-43)]. It agreed, too, there was nothing secondary about the coal lands clause [A. 44a (73)].

5. The District Court's Conclusions Concerning the Validity of the Challenged Clauses.

Regarding the crucial inquiry to be "whether the 80-cent and coal lands clauses of the 1964-66 contracts violate" the Act's Section 8(e), the district court held "neither PWC nor the 80-cent clause ran afoul of 8(e)"; that the purpose *clearly* was "to tackle in a successful way a legitimate problem of subcontracting and work preservation which has existed for decades and had been attacked for decades in unsuccessful contractual methods"; that a secondary effect of each clause "was the protection of the Welfare Fund—clearly a legitimate primary (in a labor sense) target"; that though a "secondary effect" was unionization of some non-union employers, it was "foreseeable and in that sense was a purpose at the time the clauses were negotiated"; that

the secondary purpose was an incident to the primary purpose, which was work preservation, and "obvious on the record that the unionization effect was a matter of choice, even to neutral employers", not a matter of compulsion; and that the 80-cent clause "resulted in the employer producing more with his own employees than he ever had before by substantial percentages"; and there was nothing secondary about the coal lands clause [A. 42a, 55a, 44a (72, 83, 84, 73)].

C. FACTS AND THE DISTRICT COURT'S FINDINGS AND CONCLUSIONS CONCERNING THE 1964 AND 1966 WORK STOPPAGES.

1. The 1964 Work Stoppage.

The 1958 Agreement was subject to termination after November, 1959 by a 60-day written notice [A. 14a, 20a (957-67)]. Though UMW gave no termination notice to Riverton, undisputed evidence is that if a signatory operator refused to sign the new 1964 Agreement, a 60-day notice was given [A. 20a (50, 363)]. As the district court found, Bituminous Coal Operators Association and Southern Coal Producers Association waived the notice [A. 20a (50, 341-42)], but Riverton did not.[12]

The district court found that in the fall of 1963 UMW, through District 17, called Riverton's attention it was doing business with non-union operators, operating under leases from Riverton on lands controlled by it and the purpose was to secure Riverton's "help" in organizing these operators in exchange for a UMW "consent" to a business enterprise Riverton was interested in [A. 20-21a (50)].

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[12]Though the district court declared Riverton's union employees "in fact and law" had a binding contract extending to April 15, 1964, the district court declared the instant action was not one for breach of contract under the Act's Section 301 [A. 20a, 57-58a (50, 86)].

Uncontradicted evidence is that the strike was not called or ratified by UMW or District 17 or by any officer or representative thereof (J.A. 439).

As the district court found [A. 4a (616-40)], Riverton employees were members of UMW Local 1209, chartered by UMW under Article VI of its Constitution.

Despite a denial by District 17's field representative Emery McCoy, Riverton's president testified that about April 2, 1964 the representative warned him "there probably will be trouble" when Riverton employees learned Riverton had not signed the new agreement [A. 21a (50)].

Prior to the strike, Riverton employees had contacted District 17's field representative on April 3 and April 9, 1964 to inquire if Riverton had signed the 1964 amendment which BCOA signed on April 2 and was also signed on KCOA's behalf.

McCoy advised the men Riverton, which had not authorized BCOA to execute the agreement for it, had not signed. *On both occasions, McCoy was apprised by Riverton employees they intended to strike, and especially so on April 9, when the men were aware numerous other operators in the area had signed the agreement. On both occasions, McCoy insisted the men keep working,* saying he was confident Riverton would sign. The strike occurred on April 10, notwithstanding McCoy's instructions (J.A. 367-76).

It is *undisputed* that on April 11 (a Saturday) McCoy was notified by District 17 President Humphreys the Riverton mine was down and was instructed by Humphreys to do what he could to get the mine in operation. McCoy attempted unsuccessfully to arrange a meeting

of the men, and insisted to those he could locate they return to work. They told him, as they had told Riverton's President on the evening the strike started, they would return only upon being advised Riverton had signed the agreement (J.A. 367-76).

On April 13, Riverton officials met with District 17 President Humphreys, who stated in his opinion the Riverton mine would return to work if the agreement was signed (J.A. 187, 350). Riverton thereupon wired UMW's President advising UMW of its willingness to sign the 1964 Agreement if UMW would eliminate the sections thereof amending provisions dealing with contributions to the UMW Welfare and Retirement Fund (the "80-cent" clause) and the "Application of Contract to Coal Lands" clause, both of which Riverton asserted to be illegal (J.A. 807-09). UMW's then Vice President, R. O. Lewis, denied the union's involvement in the strike, which he termed "a voluntary protest" of employees against Riverton's failure to execute the then current agreement. Lewis also denied the provisions in question were illegal and expressed the hope Riverton would sign the agreement which had then been signed by the majority of coal companies in the country (J.A. 810). On April 15, Riverton advised UMW it would sign the agreement and asked that Representative McCoy be sent to its office for that purpose. McCoy went to Riverton's office, where he was presented with the agreement form, as executed by Riverton. Riverton advised McCoy the agreement was signed under protest. The mine thereupon returned to work (J.A. 188, 376-77).

Arby McCoy (not related to Emery McCoy), Local Union 1209's Financial Secretary and Mine Committee Chairman elected by members working at the mines (J.A. 423-24), *whose testimony is unrefuted,* testified he

learned of Riverton's failure to sign the 1964 Contract from District 17 when he was told that Riverton hadn't signed the contract yet "but they are going to" and the District advised that the men continue to work, which he reported at a local union meeting on April 4, 1964, and was instructed there to ascertain whether Riverton intended to sign the contract (J.A. 425-26). Arby McCoy's further unrefuted testimony is that he was pressed by the working miners for an answer to the inquiry, "when are we going to strike? Let's strike, we are going to come out, we don't have a contract yet" (J.A. 426); on Friday, April 10, Arby McCoy and the local's President Perry visited Lewis Davison, Riverton's President (denied by Davison, J.A. 475-76), where they were told that Riverton was not going to sign the new agreement because of the "land clause in there, which is the 80 cents" (J.A. 426), to which Arby McCoy replied he had never worked without a contract and did not intend to work without one (J.A. 426).

Henry Oakes, Chairman of the Mine Committee of Transport, Inc., which hauled coal for Riverton and was under contract with UMW at the time, corroborates Arby McCoy's testimony that upon being advised of Davison's intention not to sign the contract, he declared he would not "scab either" and that the trucks quit hauling coal about nine o'clock on Friday, April 10 (J.A. 426-27, 437-38). As Oakes related, "no contract, no work", that "we had already worked a few days there, the men was pretty hot", and "if you have ever been around coal miners . . when they get hot, sometimes they get furious" (J.A. 438).

Despite corroborative evidence, the district court found the April, 1964 strike was to force or require Riverton to

enter into the proposed agreement, and force or require it and Davison to cease dealing in production of coal producers not signatory to UMW's agreement and to cease doing business with them. But, the district court declared that "Another effect of the said strike was to encourage coal producers selling coal to Riverton or Davison to recognize or bargain with the defendant Union as the representative of the employees of such producers", even though UMW had not been certified as such [A. 25a (55)].

Following Riverton's execution of the 1964 Agreement on April 15, 1964, Riverton bought no more coal from non-signatory suppliers (A. 26a) and its president informed all suppliers that it had so signed and that because thereof "they would have to become signatory to the contract and furnish me with a letter saying they were a signator before I could buy any more coal from them" (J.A. 194).

The district court found (A. 25a) after Riverton signed the 1964 Agreement, and as a result thereof, some 15 non-union producers from which Riverton bought supplemental coal became signatories to UMW's contract but 22 did not: hence, the district court found "*the effect was not to 'force' or 'compel' but to encourage*" and "Such 'encouragement' was not a primary object of the strike--it was a recognized incident" and "*The design or purpose or object remained—job protection*" [A. 25a (55)].

In holding UMW responsible for the 1964 stoppage, the district court rejected unrefuted testimony and found UMW and its District 17 agents had knowledge on and before April 10 that UMW members employed by Riverton believed their collective bargaining agreement was about to terminate and that members might not work

without a contract "i.e., the officials knew that the men working in the mines, on learning of the end of the BCOA-UMW negotiations in March, 1964, and the contract formalization in early April, concluded that ended all existing contracts and made 'scabs' of them if they worked for any operator who had not ... signed the newly negotiated contract"; that "These agents also knew that the Riverton contract had not been terminated, that no termination notice had been given by either party, and that the contract would remain in full force and effect for at least sixty days after such a notice was given" and that "With full knowledge of the men's belief they took no steps to advise the members that the contract had not been terminated and would continue to remain in full force and effect" [A. 23a (53)].

The district court further found field representative McCoy was authorized by UMW and its District 17 to handle the Riverton matter and "the Union's 'man' in charge on the spot, threatened 'trouble' if Riverton did not sign the new printed form of agreement"; that "When Riverton employees in effect asked" the representative "if Riverton and UMW still had a contract he 'told them that they didn't have one' "; and that for many years, as the representative knew, UMW "has had a tradition 'no contract, no work' " [A. 23-24a (53)].

As an ultimate finding of fact, the district court declared "the action of the District representatives, in its context, was equivalent of a 'signal' to 'strike' and was so intended" by them and the men and that the "Union instructed its members to strike, not by direct viva voce but in 'union lingo'—as well understood by all concerned ..." [A. 24a (54)].

While avowing, under *UMW* v. *Gibbs*, 383 U.S. 739,

and "that part of *Coronado*, 259 U.S. 344 (1921)" and "268 U.S. 295 (1925), which survived subsequent statutory enactments" the district court could not hold UMW responsible under any theory of passivity (failure of defendant's agents to end the strike), or to take disciplinary measures against "Union local officer or member for participation in an 'unauthorized' strike", nonetheless the district court, finding "Something affirmative is required before a conclusion of 'union authorization' is justified", found such requirement in the 1958 Agreement's "integrity" provision[7] and not "the quasi-affirmative expression of District 17 on April 10, 1964, that there was no contract between Riverton and the Riverton workers" declaring, "There was" [A. 24-25a (54-55)].

2. The 1966 Work Stoppage.

The 1964 Agreement continued effective until March 31, 1966, and was terminable thereafter by a 60-day notice. UMW gave Riverton no termination notice. A strike beginning on April 12, 1966 again shut Riverton down. It ended about April 27, 1966, when Riverton agreed to sign the 1966 Agreement, which it executed on May 3 of that year, after informing UMW the 50-cent clause was unlawful and Riverton was signing "under protest" [A. 26a (605-09)].

The stoppage's immediate cause was a picket line at Riverton and elsewhere by dissident members of UMW Local Union 8843 [A. 27a (407, 414-16)]. The indirect cause of the unrest which affected *not only Riverton but other area mines as well*, was dissatisfaction with a con-

[7] This provision provided that UMW and the signatory operators "agree and affirm that they will maintain the integrity of this contract" and that all disputes and claims, not settled by agreement, shall be settled by the Agreement's "Settlement of Local and District Disputes" section, unless national in character, in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry.

tract which they had understood had been negotiated in the industry on or about April 1, 1966, and which it was believed was to become the basis for other UMW contracts [A. 27a (439, 441)]. At the time of the stoppage, UMW was in negotiations with BCOA for a new agreement. *In fact, neither the stoppage nor wage negotiations then underway or which thereafter occurred in 1966 was concerned with the 80-cent clause or the Land Lease clause; they were concerned with other economic factors* [A. 27-28a (441, 993-95)].

UMW did not, nor did District 17 or any of its agents, authorize or ratify the work stoppages at Riverton or elsewhere, nor did either party authorize or ratify the picket lines of Local Union 8843. As of April 11, 1966, several area mines were involved in the stoppage. UMW's International Officers directed District 17, by telegram, to instruct the men to return to work pending outcome of negotiations (A. 28a). District 17 had its representative, Emery McCoy, thus advise the groups of men involved. McCoy read the International Officers' telegram to the men and repeatedly called upon them to return to work (J.A. 383). He also called upon the officers of Local Union 8843 (J.A. 413). The men refused to return in spite of his efforts (J.A. 334, 410-11). While this situation prevailed, UMW succeeded in reaching an agreement with BCOA. Most area mines, including Riverton, made known their intention to sign the agreement and thereupon the Riverton men resumed work. As in 1964, Riverton signed the wage agreement individually, *and although the so-called "80-cent" provision had not been an item of dispute in 1966 negotiations, Riverton again noted in a letter to District 17 that execution of the amendment on its part was under protest because of the provision* (J.A. 811).

The 1966 Agreement carried forward and preserved the terms and conditions of the 1950 and 1952 Agreements as amended or supplemented thereby including, as the district court found, "the 40-80 cent welfare clauses" and the "Application of Contract to Coal Lands" clause. As the district court found further "At the multi-employer-Union level the 1966 negotiations were not concerned with the 80-cent clause", which caused the sporadic and wildcat strikes in general in April of 1966 (A. 26-27a).

As the Bureau of Labor Statistics, United States Department of Labor, reports in its Bulletin No. 1558 dealing with wage chronology in the bituminous coal mines, 1933-68 recites [A. 28-29a (993-95)]:

> *"On April 11, 1966, in the absence of agreement on the union's proposals, about half of the industry's mines were closed by a walkout, and remained closed until an agreement reached on April 24 was ratified by the workers and signed by the parties on April 27. The parties to the earlier settlement at mines in the midwest rescinded that agreement on April 27 and on the same date signed an agreement identical to that negotiated by the Bituminous Coal Operators' Association."*

Riverton did not, after execution of the 1966 amendment, purchase coal produced by operators who had not signed the current UMW agreement (A. 29a).

3. The District Court's Conclusions Concerning the 1964 and 1966 Work Stoppages.

The district court concluded *none* of the "proximate results and foreseeable effects . . nor the collection of them, constituted the primary purpose for exacting the 80-cent clause bargain" which was to "prevent subcontracting, preserve Riverton's employees' work, maintain

union standards in the production of coal which could just as well have been produced by Riverton and protect the integrity of the Welfare Fund" [A. 56a (85)], although it also concluded UMW "induced and encouraged individuals employed by" Riverton "to engage in a strike and a refusal to perform services for Riverton in the course of their employment and also threatened, coerced and restrained Riverton, as those words are used in 8(b)(4)(A) and (B)" [A. 55-56a (84)]; that "An object, and by far the primary object, of such conduct was to force and require Riverton to enter into the 1964 Agreement containing the 80-cent clause" [A. 56a (84)], which proximately resulted in forcing Riverton to cease dealing in products of other coal producers, not unionized, and of forcing "some then non-union producers to unionize", thus bargaining as the representative of employees UMW did not represent as a matter of certification [A. 56a (84-85)].

In concluding the 1964 strike was union-authorized, the district court "applied *Coronado* as modified by 29 U.S.C. §185(e)"; and in applying that section, the district court, declaring it had "not held the plaintiff to proof of specific authority", nonetheless declared "*the authorization of the Field Rep. McCoy to represent the District on the spot included an authorization to call a strike, which he did as effectively as if he had used that language when he gave the signal, 'I told them that they did not have one'—meaning a contract*" [A. 56-57a (85)], *and that plaintiffs had shown by a preponderance of evidence that UMW, "through its District 17, authorized the 1964 strike"* [A. 57a (85)].

With respect to the 1966 strike, the district court concluded "*there is no evidence . . based on which this Court*

could say" plaintiffs maintained the burden of proving by a preponderance that "District 17, or the defendant, either authorized or ratified the 1966 strike at Riverton" and that "There is certainly no connection whatever between the 80-cent clause in either the 1964 or 1966 contract and the 1966 strike" [A. 57a (86)].

D. THE SIXTH CIRCUIT'S OPINION AND JUDGMENTS.

1. As to the Challenged Clauses.

In total disregard of the district court's findings and conclusions concerning the challenged clauses and the limitation imposed upon the Sixth Circuit by Rule 52(a), Federal Rules of Civil Procedure,[14] the Sixth Circuit held "The eighty cent penalty clause was not directed at job security, because Riverton could comply therewith by closing its mines, discharging all of its employees, and filling its entire requirements with coal from other signatory mines" and "Furthermore, Riverton could purchase coal from a signatory mine supplier whose employees were operating under substandard wages and working conditions" and, further, "The trouble is that the clauses in question here were not 'addressed to the labor relations of the contracting employer [Riverton] vis-a-vis his own employees', but on the contrary, to the boycotted employers (nonsignatory suppliers)" (A. 71a).

Rejecting the district court's and UMW's reliance on NLRB's *Int. Union, UMW, et al.*, 188 NLRB No. 121, 76 LRRM 1394, 1396 (1971), the Sixth Circuit pointed out "the Board has not been consistent in its rulings on

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[14] Rule 52(a), F.R.C.P. provides, in part:

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58 . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

either the eighty-cent or the PWC clause"; that NLRB "first held that PWC was illegal" and "The following year . . it held the eighty-cent clause illegal"; and, though noting the remand of the District of Columbia Circuit as to PWC and the 80-cent clause, as well as NLRB's subsequent imprimatur of both PWC and the 80-cent clause, the Sixth Circuit held "In our view, the Board decisions holding the two clauses to be illegal, appear to be better reasoned decisions", observing that "Seven Board members have held the eighty-cent clause invalid" and that "Only three Board members and no trial examiner have held otherwise" (A. 73a).

Further, the Sixth Circuit opined, "We do not regard the decisions of the Board as controlling on us in damage actions under Section 303" (A. 74a).

In Riverton, declared the Sixth Circuit, "the supplemental coal which Riverton and Davidson were purchasing from signatory and nonsignatory suppliers involved work which was never performed by their own employees" and that "Riverton was operating at all times at full capacity, but because of lack of working capital and of mining equipment, it could not run additional mines, and it was necessary for Riverton to purchase coal to fill its orders" (A. 71a).

2. As to the Work Stoppages.

a. The 1964 stoppage and its purpose.

The Sixth Circuit emphasized that "If any object of the strike is forbidden by Section 8(b)(4), it is a secondary boycott" and "It is not necessary to find that it was the sole object"; and, pointing to the district court's finding that "an object" of the 1964 strike was to force Riverton to sign the agreement containing the 80-cent

clause while another object was to compel Riverton and Davison to cease doing business with, and to cease using the products of other coal producers who were non-signatories (A. 70a), the Sixth Circuit declared "The forseeable purpose of the eighty cent clause was 'the unionization of some non-union employers'" (A. 70a). Significantly, however, in quoting the district court's findings of "another object", detailed herein (*ante*, pp. 19-22), the Sixth Circuit failed to include the district court's further finding that "Some twenty-two did not—so the effect was not to 'force' or 'compel' but to encourage" and "Such 'encouragement' was not a primary object of the strike—it was a recognized incident" and, further, "*The design or purpose or object remained —job protection*" (A. 25a).

Disagreeing with UMW that the district court's finding that UMW authorized or ratified the 1964 strike is not supported by substantial evidence and is clearly erroneous, the Sixth Circuit declared (A. 72-73a):

> "The District Court detailed the evidence to support its findings, which included the conduct of Field Representative Emery McCoy and other UMW agents who, although they knew that the 1958 contract was still in full force and effect, led Riverton employees to believe that they did not have a contract. As these agents well knew, UMW members had a tradition of 'no contract, no work'. To tell them that they had no contract was the 'signal' for them to strike. The strike was settled only when Riverton signed under protest the new agreement containing the eighty cent penalty clause. Thus UMW also ratified the strike. The testimony to the contrary of UMW agents was not credited by the District Court. The testimony of the McCoy's was characterized by the Court as 'less than candid.'"

The Sixth Circuit also held the 1964 strike violated the 1958 Contract which the district court held contained a 'no strike' clause (A. 72a); *but the Sixth Circuit ignored the district court's further finding that "Since . . this Court attaches no significance to any union inaction"; and "this is not a 301 case this finding No. 45 had no effect on the decision of this Court"* (A. 30a).

b. The 1966 stoppage

Rejecting UMW's argument that subcontracting is a bargainable issue, as held in *Fibreboard Paper Prods. Corp.* v. *NLRB*, 379 U.S. 203 (1964), the Sixth Circuit held "This case is inapposite for it involved the contracting out of maintenance work previously performed by the company's employees and such contracting out would have adversely affected them by reason of discharges and layoffs" (A. 71a), whereas the Sixth Circuit further held the 1966 strike also illegal, "violated the provisions of the 1964 'no strike' contract" and the Act's Section 8(d) [A. 74a].

Noting Riverton could terminate the 1966 strike only by signing the 1966 amendment, which it did under protest and which, as the Sixth Circuit stated, "contained the illegal eighty-cent penalty clause", the Sixth Circuit declared UMW did nothing to persuade its members to return to work other than to send a telegram and "did not even tell them that they had a valid contract which was being violated by their work stoppage" (A. 74a). Further, declared the Sixth Circuit, UMW "did not undertake to discipline the strikers", characterizing its inaction as "a form of influence and persuasion" (A. 74a). To the Sixth Circuit, "UMW benefited by the strike and took advantage of that fact to get a new contract" (A. 74a).

The Sixth Circuit likewise attributed responsibility for the 1966 stoppage to UMW because, as it declared, "Local 1209 was not an autonomous labor organization separate and apart for UMW" but "was an administrative arm" of and "was supervised, dominated and controlled by UMW" because "UMW had the right 'to reverse the action of the Local Union' " and with power to correct the local union's unlawful action and deciding to accept the benefit of it instead of taking appropriate action to halt the strike as it was required to do under the Contract, UMW thereby induced and encouraged both the 1964 and 1966 strikes (A. 75a).

According to the Sixth Circuit, "The findings of fact by the District Court that UMW did not induce or encourage the 1966 strike, and did not thereby violate the Act, are not supported by evidence and are clearly erroneous" (A. 75a).

3. As to Damages and Judgments.

Having held the challenged clauses to be illegal, the Sixth Circuit noted the district court had rejected damages claimed by plaintiffs "except to the extent" of $150,312.50, plus interest (A. 76a).[15] As indicated (*ante*, p. 6), the Sixth Circuit directed entry of judgment therefor. The Sixth Circuit rejected UMW's claim of excessiveness to be "clearly without merit" (A. 78a).

4. As to Davison.

Agreeing with the district court (A. 42a), the Sixth

[15]This amount included (A. 59-60a):

1. Lost profits of $64,000.00.
2. Amount paid Ford Coal Company in compromise of a suit brought by it for a breach of contract of $15,000.00, and incurred attorneys' fees and expenses of $1,793.46 in defense of the case.
3. Damages from the 1964 strike of $13,095.57.
4. $36,128.50 from the 1966 strike.
5. Attorneys' fees and expenses of $20,294.97 in prosecution of unfair labor practice proceedings against UMW with respect to the same factual matters now before the Court.

Circuit was of opinion that "Riverton and its parent corporation Davison are proper parties to bring the action" (A. 78a).

E. PURSUANT TO THE DISTRICT OF COLUMBIA CIRCUIT'S INDICIA, NLRB HAS SUSTAINED THE VALIDITY OF PWC AND THE 80-CENT CLAUSE AS PERMISSIVE UNDER SECTION 8(e).

1. NLRB Has Validated PWC.

The district court found (A. 18-19a):

As noted (*ante*, p. 13), on August 27, 1963, three NLRB members of NLRB found the 1958 Agreement's PWC banned by the Act's Section 8(e) [144 NLRB 228]; and on December 12, 1963, NLRB, on reconsideration *en banc*, officially recorded its inability to arrive at a majority decision. Thereafter, in *Raymond O. Lewis, et al.*, 148 NLRB 249, PWC was again held by a Board panel to fall within Section 8(e)'s ban, even though NLRB had characterized PWC as a "union standards clause". Upon appeal, the District of Columbia Circuit, noting its prior holdings that *such a clause* would not ordinarily violate Section 8(e) so long as it was germane to the economic integrity of the principal work unit or sought to protect and preserve the work and standards the union had bargained for, remanded the case to NLRB to consider the effect of the union standards clause, to determine the unit size to which it applied and to bear in mind the problems of "substitute" and "supplemental" coal in subcontracting in the bituminous coal industry. *Lewis, et al.* v. *NLRB*, D.C. Cir., 350 F.2d 801. Upon remand and approving an NLRB trial examiner's findings or conclusions that the work unit was the bargaining unit, that PWC's invalidity was not established merely by showing it might have a secondary impact on occasion, that PWC did not compel the industry's unorganized segment to

sign the contract and that PWC's intention was to encourage but not compel unorganized operators to sign. *NLRB found PWC "was adopted by the contracting parties . . to protect and preserve the 'unit work' of employees covered by the contract by precluding the subcontracting of 'unit work' to operators who did not maintain union standards"* and, accepting the District of Columbia Circuit's view "of the legality of protecting unit work through the medium of a union standards clause", *held PWC "does not contravene Section 8(e)". W. A. Boyle, et al.*, 179 NLRB No. 80, 72 LRRM 1426, 1428-29 (1969).

2. NLRB Has Validated the 80-cent Clause.

Included in the district court's conclusions is a history of the 80-cent clause before the District of Columbia Circuit and the NLRB:

> The validity of the 80-cent clause was first posed to NLRB following its inclusion in the 1964 Agreement. NLRB, with Board member Jenkins dissenting, found that "Given the operative economic and industrial factors in the industry, the inclusion of the instant clause in the 1964 Agreement constitutes secondary pressure on unsigned Operators" and that "The instant clause . . is . . an implied union signatory agreement restricting the subcontracting of work to operators under contract with the UMW, without regard to unit considerations" [*Raymond O. Lewis, et al.*, 148 NLRB 249, 255 (1964)].[14]

Meanwhile, in June, 1967, NLRB (with Board member Jenkins dissenting) held the 80-cent clause "does not qualify as a wage-standards provision because a penalty is imposed whenever unit work is subcontracted to nonsignatory operators without regard to the wage standards

[14] Both PWC and the 80-cent clause were before the District of Columbia Circuit in *Lewis* v. *NLRB*, 350 F.2d 801, in which, as already noted (*ante*, p. 31), that Court remanded the case to NLRB.

of such employers" [*Int. Union, UMWA, et al.*, 165 NLRB 467, 468 (1967)]. But, *upon review*, the District of Columbia Circuit declared that "*Since the 80-cent clause is by everyone's admission and our characterization a substitute for the union standards clause*"[11] and remanded the case to NLRB, "to carefully consider whether in fact" the clause functioned as one and that "If it is a union standards clause and the Board affirms *Boyle*,[12] the 80-cent union standards clause would seem to be a valid provision" [*Int. Union, UMWA* v. *NLRB, et al.*, D.C. Cir., 399 F.2d 977, 980 (1968)].

With PWC's validity established in *Boyle* (*ante*, p. 32), NLRB undertook to determine the 80-cent clause's legality status.

Upon remand, a Board majority (with Chairman Miller and Member Brown dissenting), in agreement with its examiner, found the evidence established that (1) *the parties' intent* in adopting the 80-cent clause "*was to equalize the differences in the costs of wage and fringe benefits generally existing between mines signatory*" to the National Agreement and "those which are not *in order to protect the work opportunities and standards provided UMW members employed by signatory operators*", (2) wage, fringe and working condition standards of employees in nonsignatory mines are generally lower than those established in the National Agreement; and (3) the 80-cent payment to which signatories are obligated on nonsignatory coal purchases bears a reasonable relationship to the wage and fringe benefit

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[11] Since plaintiff's Dan S. Davison was an intervenor in *Int. Union, UMWA* v. *NLRB, et al.*, D.C. Cir., 399 F.2d 977, 980 (1968), it is obvious the District of Columbia Circuit's reference to "everyone's admission" included plaintiff's intervenor Davison.

[12] After the District of Columbia Circuit's remand of PWC to NLRB, the style of the case was changed from "Lewis" to "Boyle".

differentials between employees of signatory and nonsignatory operators. *Int. Union, UMWA, et al.*, 188 NLRB No. 121, 76 LRRM 1394, 1395 (February 26, 1971).

NLRB concluded "*the 30-cent clause functions as a union standards clause in protecting and preserving the work of employees working under the UMW agreement* and the standards under which such work is performed by removing the economic incentive to subcontract such work stemming from the lower wage and fringe benefit cost of nonsignatory mines" (p. 1395). NLRB's General Counsel held the coal lands clause *not to be secondary* (A. 44a).

As NLRB's *Int. Union, UMWA, et al.* recites, "As the allegations of Sec. 8(b)(4)(i), (ii)(A) and (B) violations are dependent on our finding that the 30-cent clause violates Sec. 8(e), we shall also dismiss those allegations of the complaint" (76 LRRM 1396, fn. 12).

REASONS FOR GRANTING THE WRIT

A. THE SIXTH CIRCUIT'S HOLDINGS CONCERNING THE CHALLENGED CLAUSES CONFLICT WITH PRIOR IMPORTANT DECISIONS AND PRINCIPLES OF THIS COURT, THE DISTRICT OF COLUMBIA CIRCUIT AND NLRB.

Under the Act's Section 303(a) [A. 85a], it is unlawful for a labor organization "to engage in any activity or conduct defined as an unfair labor practice in" Section 8(b)(4).

The Act's Section 8(b)(4)(A) [A. 81-82a] makes it an unfair labor practice for the union to engage in, or induce or encourage employees to engage in, a strike or refusal in the course of the employees' employment to perform services, or threaten, coerce or restrain an employer where an object is to force or require any employer to enter into an agreement prohibited by Section 8(e). Section 8(b)(4)(B) [A. 82a] makes it an unfair

labor practice for a union either to strike to force any person to cease doing business with any other person or forcing any other employer to recognize or to bargain with the union as representative of its employees unless the union has been certified as such, but the proviso therein states, "*That nothing contained in this clause (B) shall be construed to make lawful, where not otherwise unlawful, any primary strike or primary picketing.*"

Under the Act's Section 8(e) [A. 84-85a], Congress forbids, as an unfair labor practice, agreements between a labor organization and an employer by which the latter agrees to cease or refrain from dealing in the products of another employer, or to cease doing business with such employer. The Sixth Circuit rejected UMW's argument the 80-cent Welfare Fund and the coal lands clauses are primary and lawful because their purposes or aims are to protect the negotiated labor standards of those employees whose employers are signatories to UMW's National Agreement, and to preserve their employment opportunities (A. 70a).

A Sixth Circuit basic error is its ignoring that for a labor organization to violate Section 8(b)(4) *the prohibited conduct thereunder must be for a banned object* which, under 8(b)(4)(A) requires the bargaining agreement to be prohibited under the Act's 8(e), and that under 8(b)(4)(B) a *primary* strike does not constitute an unfair labor practice.

The Sixth Circuit's holdings that the challenged clauses were not "addressed to the labor relations of the contracting employer [Riverton] vis-a-vis his own employees' but, to the contrary, "to the boycotted employers (nonsignatory suppliers)", and that the 80-cent clause "was not directed at job security" (A. 71a), conflict with

this Court's avowed disinclination to condemn labor agreements as illegal per se and to "assume that a union conducts its operations in violation of law". *Local 357, Teamsters* v. *NLRB*, 365 U.S. 667, 676; *NLRB* v. *News Syndicate Co.*, 365 U.S. 695. These enunciations are consistent with *Great Northern Ry. Co.* v. *Delmar Co.*, 283 U.S. 686, 691, which declares "where two reasonable constructions of a written contract can be made, preference is given to that construction . . that does not result in a violation of law."

Additionally, *National Woodwork Mfgrs. Assn.* v. *NLRB*, 386 U.S. 612 (1967) admonishes lower federal courts that the determination whether a union-management agreement falls within the scope of Sections 8(e) and 8(b)(4) "cannot be made without an inquiry into whether, under all the surrounding circumstances, the Union's objective was preservation of work . ., or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere" (p. 644).

Following the above mandate of this Court, the district court's findings and conclusions that the challenged clauses were permissive under Section 8(e) were predicated upon undisputed facts relating to the bituminous coal industry's history of collective bargaining and its relevant economic facts (*ante*, pp. 9-11), UMW's historical efforts to preserve work opportunities for its members through contractual restrictions (*ante*, pp. 11-13), UMW's achievement of the challenged clauses (*ante*, pp. 13-15) and its being concerned with the same economic reasons and the need for protecting work opportunities and security of employees as confronted it in demanding PWC in the 1958 Agreement. Furthermore, it had this Court's word that subcontracting was a bargainable issue

[*Fiberboard Paper Prods. Corp.* v. *NLRB*, 379 U.S. 203 (1964)] and that multiemployer collective bargaining was permissive (*NLRB* v. *Truck Drivers Local No. 449, Teamsters*, 353 U.S. 87).

The Sixth Circuit's failure to inquire "whether, under all the surrounding circumstances, the Union's objective was preservation of work" (386 U.S. 644), in disobedience to this Court's mandate in *National Woodwork*, readily explicates the Sixth Circuit's error in rejecting the district court's approval of the challenged clauses and for regarding as inapplicable *National Woodwork's* classic guidelines, namely, that "*The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees*" (p. 645) *and that Section 8(e) was designed to condemn subcontracting clauses possessing secondary pressure characteristics* (pp. 645-46).

Further, the Sixth Circuit's efforts to condemn the challenged clauses on the basis that "supplemental coal which Riverton and Davison were purchasing from signatory and nonsignatory suppliers involved work which was never performed by their own employees" are answered, *first*, by the undisputed evidence that Riverton covenanted in the 1964 and 1966 Agreements that "the operation of all the coal lands, coal producing and coal preparation facilities owned or held under lease by them" and that Riverton would not "lease, license or contract out any" thereof "for the purpose of avoiding the application of this agreement or any section, paragraph or clause thereof" (A. 11-12a) and, *secondly*, undisputed evidence was that contract signatories signed for "all of the production and acquired production" (J.A. 331). Furthermore, as the District of Columbia Circuit's *Teamsters, Local 710* v. *NLRB*, 335

F.2d 709, 713-14 (1964) held "Activity and agreement which directly protect fairly claimable jobs *are primary under the Act.*"

Since the district court found that "wages paid in signatory mines are materially greater than those paid by operators in non-signatory operations" (*ante*, p. 11), *Retail Clerks Union, Local 770* v. *NLRB*, D.C. Cir., 296 F.2d 368 (1961) challenges the validity of the Sixth Circuit's holding herein in its appropriate recognition that where a union seeks "to remove the economic incentive for contracting out", it thus endeavors "to preserve the work for the contracting employees" (p. 374). *Accord*: *Int. Union, UMWA, et al.*, 188 NLRB No. 121, 76 LRRM 1395.

Additionally, the Court will recall the district court's finding, with reference to Riverton, that Riverton produced more with its own employees than it had produced previously, noting "This record does not explain why financial ability to expand production (1964-65) was missing in 1962-63" (A. 13a).

Moreover a further challenge to the Sixth Circuit's attributing to the challenged clauses a "secondary boycott" status (A. 79a) and to Riverton's nonsignatory suppliers a "boycotted employers" status (A. 71a) is *National Woodwork's* holdings that Section 8(e) is not subject to literalism (386 U.S. 619-25) and that the Act's Section 8(b)(4) is "not to be read as supporting a construction of the statute *as prohibiting the incidental effects of traditional primary activity*" (p. 632). *Teamsters, Local 710* v. *NLRB*, 335 F.2d 709, 713-14, consistent with *National Woodwork*, declares "Incidental secondary effects of such activity and agreement do not render them illegal" and "Thus, the 'cease doing business' language

in §8(e) cannot be read literally because inherent in all subcontracting clauses, even those admittedly primary, is refusal to deal with at least some contractors". *Accord:* 73 Harvard L. Rev. 1086, 1119; 62 Mich. L. Rev. 1176, 1187 (May, 1964) [See Appendix D herein, p. 87a].

NLRB's variant conclusions concerning the 80-cent clause have been detailed (*ante*, pp. 32-34); and while the Sixth Circuit accurately noted that NLRB "has not been consistent in its rulings on either the eighty-cent or the PWC clause", as well as its recital of the ultimate validation thereof by NLRB (A. 73a), it omitted a crucial fact that in refusing NLRB's invalidation of the 80-cent clause, the District of Columbia Circuit's *Int. Union, UMWA* v. *NLRB, et al.*, 399 F.2d 977, 980, declared that "Since the 80-cent clause is by everyone's admission and our characterization a substitute for the union standards clause" (*ante*, p. 33) and, as already noted, plaintiffs' Dan S. Davison was an intervenor therein, so that the phrase, "everyone's admission" included plaintiffs' intervenor Davison. In any event, the fact remains that both the District of Columbia Circuit in *Lewis, et al.* v. *NLRB*, 350 F.2d 801 (1965), and NLRB in *Int. Union, UMWA, et al.*, 183 NLRB No. 121, 76 LRRM 1394, 1395 (1971), have characterized the 80-cent clause as a union standards clause and both have regarded the clause as permissive under Section 8(e) in *Int. Union, UMWA* v. *NLRB, et al.*, D.C. Cir., 399 F.2d 977, 980 (1968) and *Int. Union, UMWA, et al., supra*, at p. 1396.[10]

Moreover, the Sixth Circuit's express preference for

[10]Both PWC and the 80-cent clause are scheduled for argument in the District of Columbia Circuit on May 25, 1972 in Case No. 23,947, styled *Dixie Mining Co., Pet.* v. *NLRB, Resp. and W. A. Boyle, et al., Intervenors;* Case No. 21,129, styled *Int. Union, UMWA, et al., Pet.* v. *NLRB, Resp. and Dan S. Davison, et al., Intervenors;* and Case No. 21,226, styled *NLRB, Pet.* v. *BCOA, Resp. and Int. Union, UMWA, et al., Intervenors.*

prior Board decisions conflicts with this Court's *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), that "The administrative interpretation of the Act by the enforcing agency is entitled to great deference."

The Sixth Circuit's failure to follow this Court's previous enunciations and its conflicts with rulings and indicia of the District of Columbia Circuit and with NLRB's rulings concerning the challenged clauses, stress the importance of this Court's award of certiorari herein.

B. THE SIXTH CIRCUIT'S REVERSAL OF THE DISTRICT COURT'S FINDINGS THAT THE CHALLENGED CLAUSES WERE PERMISSIVE UNDER THE ACT'S SECTION 8(e) CONFLICTS WITH RULE 52(a), FEDERAL RULES OF CIVIL PROCEDURE.

Under Rule 52(a), Federal Rules, "Findings of fact shall not be set aside unless clearly erroneous". This Court's *Comm'r. of Internal Revenue* v. *Duberstein*, 363 U.S. 278, 291, as well as the Sixth Circuit's *Bale* v. *Glasgow Tobacco Bd. of Trade, Inc.*, 330 F.2d 281, 287 and *General Electric* v. *Sciaky Bros.*, 415 F.2d 1068, have given judicial recognition to Rule 52(a)'s command.

The Sixth Circuit's conflict with the Rule and the cited cases, UMW submits, warrants the award of certiorari herein.

C. THE SIXTH CIRCUIT'S HOLDINGS WITH REFERENCE TO UMW'S RESPONSIBILITY FOR THE WORK STOPPAGES CONTRAVENE PRIOR IMPORTANT DECISIONS AND PRINCIPLES OF THIS COURT AND OTHER FEDERAL COURTS, INCLUDING PRIOR DECISIONS OF THE SIXTH CIRCUIT.

The Sixth Circuit premised its holding that UMW was responsible for the 1964 work stoppage on the ground that District 17's field representative Emery McCoy and other UMW agents knew that UMW members had a tradition of "no contract, no work" and "To tell them that they had no contract was the 'signal' for them to strike" (A. 72a). Although the district court had found UMW

not responsible for the 1966 stoppage, the Sixth Circuit held such findings "not supported by evidence" and "clearly erroneous" (A. 75a), and premised its liability holding on the ground that UMW did nothing to persuade its members to return to work other than to send them a telegram and, in failing to discipline the strikers "Its inaction was a form of influence and persuasion" by which UMW benefited (A. 74a); and that Local 1209 was not an autonomous labor organization separate and apart "for UMW" but "an administrative arm" of, "and was supervised, dominated and controlled by UMW" with the right "to reverse the action of the Local Union" (A. 75a). UMW discusses these grounds *seriatim:*

1. The 1964 Stoppage.

Ever since the *Coronado cases*,[20] federal courts have regarded labor unions as entities distinct from union membership. Similarly, *U. S.* v. *White*, 322 U.S. 694, distinguished union membership from the union as an entity. In defining the term "agent" in the Act,[21] Congress intended to adopt the common law rules of agency, as held in *Harnischfeger Corp.* v. *Sheet Metal Workers, etc.*, 6 Cir., 436 F.2d 351 (1970)—a Section 303 action.

In *first Coronado* (259 U.S. 395), proof of "actual agency" was declared a prerequisite to union responsibility. The Act's chief proponent, Senator Taft, declared, "The fact that a man was a member of a labor union . . would be no evidence whatever to show that he was an agent".[22] *Int. Ladies Garment Workers Union* v. *NLRB*, D.C. Cir., 237 F.2d 545, 551, held that "Imputation of the

[20] *UMWA* v. *Coronado Coal Co.*, 259 U.S. 344, 387, 391; *Coronado Coal Co.* v. *UMWA*, 268 U.S. 295, 304-05.

[21] The Act's Section 301(e) [29 USCA 185(e)] and 2(13) [29 USCA 152(13)] appear in Appendix C hereto (A. 81a, 85a).

[22] See Legislative History of the Labor Management Relations Act, 1947 (Government Printing Office, 1948), p. 1204.

acts of one person to another" is forbidden "except when the one is acting as agent for the other."[23]

Since there is no claim that UMW authorized or participated in the 1964 stoppage, relevantly Section 303's legislative history,[24] as well as the federal judiciary's interpretation of the Act's "agency" definition, negates a parent organization's liability for wildcat strikes. As stated in *United Construction Workers* v. *Haislip Baking Co.*, 4 Cir., 223 F.2d 872, 877, "*We have never held, however, that there is any responsibility on the part of a union for a strike with which it has had nothing to do: and there manifestly is no such liability . .*" *Walters* v. *Int. Assn. of Plumbers*, 6 Cir., 323 F.2d 578, rejected a judgment against a parent organization because "There is no evidence . . that [the parent organization] participated in any way in the placing of the picket or ratified the picketing" and, therefore, "The judgment against it has no support".

The Sixth Circuit's opinion cites no judicial authority for its theory that advising Riverton employees "they had no contract was the 'signal' for them to strike" because of UMW's tradition of "no contract, no work", but its holding conflicts with this Court's *Coronado*, the Sixth Circuit's *Harnischfeger* and the Act's legislative history, all showing congressional and judicial policy to regard unions as legal entities and as juristic persons, separate and apart from their membership, and conjoining to challenge the employment of the Sixth Circuit's principle where unrefuted evidence affirmatively demonstrates

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[23]Accord: *NLRB* v. *Miami Coca-Cola Bottling Co.*, 5 Cir., 222 F.2d 341; *NLRB* v. *Marshall Car Wheel, etc.*, 5 Cir., 218 F.2d 409, 417.

[24]Legislative History of the Labor Management Relations Act, 1947 (Government Printing Office), Vol. II, p. 1627, 93 Congressional Record A. 3233. See also Senator Taft's statement, "The President says that a union will be liable if any of its members engaged in an unauthorized wildcat strike. *This is simply not so.*"

efforts to have Riverton employees return and continue to work (J.A. 1065-69) and uncontradicted evidence is that strike action was voluntary on the part of Riverton employees (*ante*, pp. 16 *et seq.*).

Even though, as the Sixth Circuit noted, the district court characterized the testimony of the two McCoys (*ante*, pp. 17-19) as "less than candid" (A. 73a), the absence of any variant testimony of necessity invites this Court's recall of principles followed in *C. & O. Ry. Co.* v. *Martin*, 283 U.S. 209, 219-20, that:

> "It is not proper to submit uncontradicted testimony to a [factfinder] for the sole purpose of giving the [factfinder] an opportunity to nullify it by discrediting the witness, when nothing more than mere interest in the case exists upon which to discredit such witness . ."

and *Moore* v. *C. & O. Ry. Co.*, 340 U.S. 573, 578, that "Speculation cannot supply the place of proof". Indeed, *Pennsylvania R. Co.* v. *Chamberlain*, 288 U.S. 333, 340-41, precludes use of inferences as proof where there is "uncontradicted testimony of unimpeached witnesses . . that the fact sought to be inferred did not exist". The Tenth Circuit in *Browning* v. *Crouse*, 356 F.2d 178, expresses it thus:

> "Unimpeached, positive testimony may not be disregarded, even though adduced from interested witnesses, *and no question of credibility or issue of fact is presented for determination by a trier of fact*".

2. The 1966 Stoppage.

The Sixth Circuit's ground for holding UMW responsible for the 1966 stoppage, namely, that "It did not undertake to discipline the strikers" and "Its inaction was a

form of influence and persuasion" (A. 74a) violates this Court's *UMW* v. *Gibbs*, 383 U.S. 715, 739, holding "*There can be no rigid requirement that a union" disavow strike activity which it had not authorized*, and the declaration in Mr. Justice Harlan's concurrence that *a union's failure "to take affirmative action to dispel misconduct are not in themselves proof of authorization or ratification of the wrongdoing"* (p. 743).[25] Further, *Ladies Garment Workers* (237 F.2d 552) cites *first Coronado* (259 U.S. 395) as support for its holding there is no need for disavowing misconduct by a party which has not initiated or participated therein: *"silence provides no rational basis for inferring"* UMW acquiescence in the stoppages.

This Court's *first Coronado* rejected the Sixth Circuit's theory and records a coal company's contention (259 U.S. 371, 66 L. Ed. 975, 981) that where union officers and members, of whom the union has disciplinary control, in the course of a strike, do illegal acts in furtherance of the union cause, the fact that the union takes no affirmative and public action disapproving what they have done, and suspending or expelling them from membership, is of itself the strongest kind of evidence that the acts were authorized or connived at by the union, and that they were done on the union's behalf and for its benefit. But this conduct was rejected by *first Coronado*, which held "We do not conceive that such responsibility is imposed on the national body" that *"it is not a question of contract or of holding out an appearance of authority on which some third person acts"* but *"It is a mere question of actual agency, which the constitutions of the two bodies settle conclusively"* (259 U.S. 395).

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[25]This discussion is equally apposite to the 1964 strike situation in light of the Sixth Circuit's holding that UMW's inaction induced and encouraged the 1964 strike, as well as the 1966 strike (A. 74a).

Even though in *first Coronado* UMW's president had reported to UMW's Executive Board his sympathy with the purpose of the local union's strike, the Court declared this did not "imply or prove on his part any prior initiation, or indicate a desire to ratify the transaction as his work"; that *"It would be going very far to consider such actions of the president alone a ratification by the International Board, creating liability for a past tort"*; that *"The president had not authority to order or ratify a local strike"* and that *"Only the board could do this"—action which the board did not take* (259 U.S. 394).

Additionally, the Sixth Circuit grounded UMW responsibility for the 1966 stoppage on the theory that "Local 1209 was not an autonomous labor organization separate and apart for UMW" but "an administrative arm" thereof and was supervised, dominated and controlled by UMW (A. 75a). This holding is challenged by undisputed evidence and the district court's finding that under UMW's Constitution, local union officers are elected by secret ballot of local union members and local union officers are paid from dues allocated to a local union pursuant to UMW's Constitution; that regular local union meetings are scheduled pursuant to by-laws of local unions; and special meetings are called either by the local union's president or members thereof who request the special meeting called (A. 29a).

It is in conflict with the Sixth Circuit's holding in *Harnischfeger Corp.* v. *Sheet Metal Workers, etc.*, 436 F.2d 351 (1970)—a Section 303 action—that a parent organization is not liable for picketing *by a local union* where it did not authorize picketing and its representatives did not assert authority to terminate the picketing.

Since the Sixth Circuit indicated the applicability

herein of *Int. Bro. of Teamsters* v. *Humko*, 6 Cir., 287 F.2d 231, it is relevant that in *Harnischfeger* the Sixth Circuit pointed out that in *Humko* it "relied in part upon the provisions of the international union's constitution in finding that the international participated as a 'principal actor' in the secondary boycott there in question" (p. 355).

The Sixth Circuit's holding concerning Local 1209 is at variance with its *Harnischfeger* and *Garmeada Coal Co.* v. *Int. Union, UMWA*, 6 Cir., 230 F.2d 945, affirming 122 F.Supp. 512, 518, but it also conflicts with the District of Columbia Circuit's *Busby* v. *Electric Util. Employees' Union*, 147 F.2d 865, the Seventh Circuit's *Morgan Driveway, Inc.* v. *Teamsters*, 268 F.2d 871 (1959). It likewise is challenged by *T. S. Ragsdale Co. Inc.* v. *General Drivers, etc., Local No. 509 and Int. Bro. of Teamsters*, DC, D. S.C., 1972, F.Supp. , 79 LRRM 2219, which, recognizing *Coronado's* doctrine that "subordinate bodies are entities apart from the parent" (p. 2222), noted that NLRB "has consistently recognized the separate features of the two entities" (p. 2223), and quoted in part from *Franklin Electric Construction Cooperative*, 121 NLRB 143, 145-46, that NLRB wrote

> " 'The overwhelming weight of judicial authority, including the Supreme Court of the United States, is that a local union is a legal entity apart from its international . .' " (p. 2223).[26]

While the Sixth Circuit regarded the district court's exoneration of UMW for the 1966 stoppage as being clearly erroneous, it is noteworthy that its opinion did not dispute, factually or otherwise, a single finding upon which that exoneration was based, including the district court's corroboration by the United States Department

[26]For other holdings disparate to the Sixth Circuit's holding herein, see *Ragsdale*, 79 LRRM 2223.

of Labor (*ante*, p. 24). Hence, it is manifest the Sixth Circuit's reversal was based upon legal principles which have been demonstrated to be wholly erroneous.

Lack of consistency in the Sixth Circuit's implementation of the Act's agency provisions and its conflict with its own and with other appellate courts' implementation thereof invite the award of certiorari herein. *Goldlawr v. Heiman,* 369 U.S. 463 (1962).

D. THE SIXTH CIRCUIT'S HOLDING THAT DAVISON IS A PROPER PARTY PLAINTIFF TO THE INSTANT ACTION IS ERRONEOUS.

The Act's Section 303(b) provides that "Whoever shall be injured in his business or property by reason of subsection (a) may sue therefor in any district court of the United States . . and shall recover the damages by him sustained and the cost of the suit" (A. 85-86a).

Undisputed facts show that Riverton is a wholly-owned subsidiary of Davison, and that Davison's President is Dan S. Davison and Riverton's Vice President; but Davison's primary business during 1955-1968 was exclusive sales agent for Riverton's coal on a commission basis and keeping Riverton's books. It is conceded that Davison produced no coal, participated in no collective bargaining with UMW and executed no UMW contracts (*ante*, p. 7). Further, Davison owned none of Riverton's leased properties (A. 3a). Davison's 10 employees were represented by District 50, with whom it had entered into a collective bargaining agreement (A. 4a). As the district court found (A. 32a), while prior to January 1, 1964 purchased coal was loaded and shipped through both the Crown Hill Dock, operated by Riverton, and the Marmet Dock, operated by Davison, after January 1, 1964 almost all coal purchased was shipped through the Marmet Dock, *then operated by Riverton.*

The 1964 and 1966 Agreements' "Application of Contract to Coal Lands" clause provided that (A. 27a):

> "As part of the consideration for this agreement, the Operators signatory hereto agree that this agreement *covers the operation of all of the coal lands, coal producing and coal preparation facilities owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this agreement, or acquired during its term* which may hereafter (during the term of this agreement) be put into production or use. The Operators agree that they will not lease, license or contract out any coal lands, coal producing or coal preparation facilities for the purpose of avoiding the application of this agreement or any section, paragraph or clause thereof."

Thus, it is evident that under the contract terms to be an "*affiliate*" a party plaintiff must possess the characteristics that would permit it to be an owner, a lessee, licensee or contractee, or a coal producer or operator of a coal preparation facility. Under undisputed facts, Davison was neither: It produced no coal, participated in no UMW bargaining and executed no UMW contract; it owned none of Riverton's leased properties; and during the material period it neither owned nor operated a coal preparation facility; and none of its employees were covered by UMW's contract with Riverton.

Contrary to the Sixth Circuit's sanction of Davison as a party plaintiff herein, in *UMW* v. *Osborne Mining Co.*, 6 Cir., 279 F.2d 716 (1960), Osborne's sales agent, Love & Amos, who was not a coal producer or operator but sold Osborne's coal for which it was paid a commission; and, like Davison herein, had no employees, and particularly none whom UMW sought to organize, or for whom it endeavored to secure a labor contract. *Under*

these circumstances, the Sixth Circuit held UMW did not induce or encourage the sales agent's employees to strike to compel Osborne to bargain with UMW and rejected the sales agency's right to recover as a "whoever" under Section 303 (pp. 727-29).

The issue presented in this discussion has not been, but it is submitted, should be decided by this Court because of its importance in the administration of the Act's Section 303.

CONCLUSION

For the reasons assigned, Petitioner prays that the Petition for Writ of Certiorari should be granted and that the Writ issue to review the Judgments and Opinion of the United States Court of Appeals for the Sixth Circuit entered January 21, 1972, in Cases Nos. 71-1021 and 71-1022, as aforesaid. Petitioner intends to urge each of the questions presented, even if not specifically argued herein.

Respectfully submitted,

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April, 1972

APPENDIX A

Filed October 8, 1970

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

RIVERTON COAL COMPANY, et al.,
Plaintiffs,

v.

Civil Action
No. 5805

UNITED MINE WORKERS OF AMERICA,
Defendant.

and

RIVERTON COAL COMPANY, et al.,
Plaintiffs,

v.

Civil Action
No. 6730

UNITED MINE WORKERS OF AMERICA,
Defendants.

Findings of Fact and Conclusions of Law

1. This is an action brought by plaintiffs Riverton Coal Company and Davison Fuel and Dock Company (called "Riverton" and "Davison") for damages against defendant United Mine Workers of America (Called "UMW") under Section 303 of the Labor Management Relations Act, 1947, as amended (29 USCA 187), charging UMW committed unfair labor practices under Section 8(b)(4)(i)(ii)(A) and (B) and Section 8(e) of the Act by unlawfully coercing Riverton by strike action into signing the National Bituminous Coal Wage Agreement of 1950, as amended effective April 2, 1964, and April 1, 1966,

respectively, containing the "Application of Contract to Coal Lands" clause and the 80-cent clause.

UMW denied (1) liability, (2) damages and (3) that plaintiff Davison falls within the scope of the term "Whoever" as found in Section 303 (b) of the Act so as to be entitled to a recovery for any alleged injury.

A jury was waived and the case was tried to the Court.

2. Riverton is a West Virginia corporation, qualified to do business in West Virginia, with its offices located at North Bend, Ohio. At all times material hereto, Riverton was engaged in the business of coal mining and loading river barges in West Virginia. Riverton operated coal mines on leased property in Kanawha County and Fayette County, West Virginia, and also operated coal loading docks on the Kanawha River at Crown Hill and at Marmet, West Virginia. Riverton sold a major portion of coal mined or otherwise acquired by it in West Virginia to customers located outside the State of West Virginia, and loaded river barges at Crown Hill and Marmet with coal transported in interstate commerce outside the State of West Virginia. Riverton was engaged in an industry affecting commerce among the several States.

3. Davison is an Ohio corporation qualified to do business in Ohio and West Virginia, with its offices located at North Bend, Ohio. The said Riverton was, at all times material, a wholly owned subsidiary of Davison. Davison and Riverton had common officers. The Davison family, of which Daniel Davison and Lewis Davison are members, owned the majority interest in the common stock of Davison Fuel and Dock Company. Davison owned land mined by Riverton and also owned the Marmet dock which it likewise leased to Riverton. Some of the non-signatory coal producers from which Riverton bought

coal at relevant times in this proceeding operated their mines on lands owned by Davison. Davison was exclusive sales agent for Riverton's coal, receiving commissions of from 6% to 8% of the sales price of all coal sold by Davison for Riverton. Davison was an affiliate of Riverton. Davison is engaged in an industry affecting commerce among the several States.

4. Davison acted as record keeper for Riverton. During said period, Davison owned some coal land but produced no coal and participated in no collective bargaining negotiations with UMW and executed no UMW contracts.

5. Riverton owned no coal property but operated mining properties and produced coal at three mines in Kanawha and Fayette Counties, West Virginia, on land leased by Riverton from third parties. Some of Riverton's leased properties were owned by Davison.

6. The defendant UMW is an unincorporated association and a labor organization, with headquarters in Washington, D.C., and a district office in Charleston, West Virginia. At all times material hereto, it was serving as exclusive bargaining representative of certain employees of Riverton employed by Riverton to work in the said coal mines and docks of Riverton located in the State of West Virginia. For the purposes of this litigation only, it is admitted that at all relevant times in its relations with the plaintiffs, District 17 was acting as agent for the defendant UMW. R. R. Humphreys was President and Secretary-Treasurer of District 17 and was on the International payroll of the defendant UMW. His duties included the supervision and instruction of field workers in their duties. Emery McCoy was field representative of District 17. His duties included servicing local unions at the di-

rection of the said District President. Charles Neal, now deceased, was Vice President of District 17 and worked under the direct supervision of the said District President. R. O. Lewis preceded the said R. R. Humphreys as President of District 17.

7. Defendant UMW, an unincorporated association is a "labor organization" within the meaning of the Labor Management Relations Act, 1947. During the past 20 years approximately 75 to 82 percent of all production in the bituminous coal industry has been produced by UMW members as employees of unionized employers and during that same approximate period there has not been a nationwide strike of its members, authorized or wildcat.

8. The said employees of Riverton belonged to Local 1209, a duly chartered local, and subordinate branch of the defendant Union. As of January 1, 1964, Davison had no UMW employees in West Virginia; its ten employees at the North Bend, Ohio, plant were represented by District 50, with whom it had entered into a collective bargaining agreement.

9. At all times Riverton had sufficient coal reserves on the property which it leased as lessee to satisfy all orders and calls from customers—this was true quantity-wise and also grade- or quality-wise. It did not increase its production to fill its orders and calls because Riverton "could not financially put in any more coal mines." Riverton's projected costs would have exceeded what it cost to acquire added coal through contracts with small operators, some union and some not, and some operating under subleases on land controlled by Riverton. But for the financial limitations, Riverton's coal reserves were sufficient to produce all coal necessary to fill all of River-

ton's and/or Davison's requirements to supply all its customers or contractees.

10. Riverton did not mine all the coal it needed or that Davison needed to fulfill its contracts and it was customary "to buy supplemental coal" from various producers, some operating on Riverton's lands. Riverton had first refusal on coal produced by them. Riverton also bought coal from other producers operating on lands other than Riverton's. All coal so purchased, of varying qualities and grades, except for lump coal was commingled. Most purchased coal was produced by companies not signatory to the UMW contract. There is no evidence that the "supplemental" coal purchased was purchased because Riverton-produced coal did not meet the type or quality demands of its customers. The only supplementing was in quantity. Prior to January, 1964, Davison purchased coal from its wholly-owned Fields Creek Mining Co., which ceased production when its No. 3 mine worked out.

11. During the period July, 1963, through March, 1964, Riverton purchased a total of 322,250.72 tons of non-signatory coal as compared with 87,400.16 tons acquired from signatory producers and of this amount of about 409,000 tons, some 273,000 tons was produced by operators working lands leased or owned by Riverton or Davison.

12. Collective bargaining in the bituminous coal industry has long followed a multiemployer pattern. In 1941, the Appalachian operators split into northern and southern groups and signed separate agreements with UMW. Despite this split among the operators, a uniform national agreement was negotiated for the industry in 1945. Since 1942, UMW's agreements have been on a

uniform, industry-wide basis (which was true as to the 1964 and 1966 Agreements) with the exception of captive mines which use their own coal and do not purchase other coal.

13. The division of operators into northern and southern groups persists to this day. The Bituminous Coal Operators Association (BCOA), formed in early 1951, represented northern operators and Southern Coal Producers Association (SCPA) represented the southern operators, in dealing with UMW. From 1942 through 1966, UMW contracts were negotiated with coal operator associations, individual companies and individual operators. Since 1950, collective bargaining negotiations in the industry have generally been conducted under the following pattern: UMW first negotiates an agreement with representatives of BCOA. Terms of the BCOA agreement are then presented to SCPA, the midwest operators associations and individual operators.

14. Riverton is and has been a member of Kanawha Coal Operators Association (KCOA), which has handled and continues to handle Riverton's grievances with UMW under the application of the National Agreement. KCOA, in turn, is and has been a member of SCPA. SCPA became a member of BCOA in 1968. Riverton did not authorize KCOA either to negotiate for or to execute either the 1964 or 1966 Agreements, which Riverton itself executed. The 1958 Agreement was executed by SCPA on behalf of Riverton. By letter of February 28, 1966, KCOA notified District 17's president that it was authorized by Riverton to represent it in the application of the National Agreement. "Application" is to be distinguished from "negotiating" or "agreeing to." Riverton did not authorize anyone, KCOA or SCPA or BCOA,

to either bargain or negotiate, or agree for it in either 1964 or 1966. It was not, in either year, a member of any "multiemployer" bargaining group.

In each of the UMW collective bargaining negotiations since 1950, UMW has hammered out a collective agreement with one or more multiemployer groups (such as BCOA or SCPA) and then presented the agreed result to other smaller multiemployer groups and individual operators. The result has consistently been an industry-wide contract (generally leaving room for negotiation and agreement over local matters not inconsistent with the provisions of the basic contract). The result since 1950 (in at least each of 1950, 1952, 1958, 1964, 1966) has been the same as though the industry on one side and the Union on the other had actually engaged in industry-wide bargaining—and this was true to a considerable extent for some years before 1950. As a practical matter (historically) one unit at the bargaining table has been all the UMW members, industry-wise, and not at that time but as a sort of practical nunc pro tunc all the industry employers, except the captive operators. The non-represented (at the basic bargaining) employers have been, in today's parlance, the "dominoes."

15. Bituminous coal markets had contracted severely in the years immediately prior to 1958. In the 1945-64 period, coal production declined from a high of 630 million tons in 1947 to a low of 391 million tons in 1954. Thereafter, a partial recovery to 500 million tons in 1956 preceded a rapid decline to 410 million tons in 1958. This long-term market decline was accompanied by an enormous investment by the industry in machinery designed to increase efficiency in the mines and to preserve coal's competitive position vis-a-vis other fuels. Where-

as in 1948 the percent of bituminous coal in the distribution of mineral fuels was 40.1, as compared with 35.1 percent for petroleum products and 16.6 percent for natural gas, this had so changed by 1963 that the comparative percentages for that year were 21.6 for coal, 40.7 for petroleum products, and 33.2 for natural gas. Together, loss of markets and mechanization had a heavy impact on the number of jobs in the industry. In 1948, almost 411,000 men were employed in the mines. Ten years later that figure had shrunk to less than 174,000 and the trend was continuing strongly downward, so that in 1963 production workers in the industry numbered less than 121,000. For a further background see Mr. Justice Goldberg's opinion in Mineworkers v. Pennington, 381 U.S. 657, at 672 and 697, 65 LRRM 2369 et seq.

16. Within the industry, the 1948-63 period saw great changes in consumption patterns. The railroad market, once a principal outlet for bituminous coal, disappeared; the retail market was reduced by 60 percent; while, on the other hand, electric utilities more than doubled their purchases to become, as a class, coal's largest single customer.

17. In 1945, the capacity of bituminous coal operators to produce coal was 620 million tons, the idle capacity was 42 million tons, thus making the percentage capacity utilized 93.2 percent. In 1947, the capacity was 755 million tons, the idle capacity 124 million tons, and the percentage of capacity utilized 83.6 percent. In 1954, the capacity was 603 million tons, the idle capacity 211 million tons, and the percentage of capacity utilized was 65 percent. In 1958, the capacity was 625 million tons, the idle capacity 215 million tons, while the percentage of capacity utilized was 65.7 percent. 196[illegible] capacity of 627 million tons carried an idle capacity [illegible] million

tons, so that the percentage of capacity utilized was 73.2 percent.

18. Coal producers were able to produce far more coal than the country could consume, up until the last six months and that was true for years prior to either 1958 or 1964.

19. The utility and steel industries are among the largest and most stable purchasers of bituminous coal. It is customary for companies in these industries to cover a high percentage of their needs through long-term contracts. Producers entering into these contracts often need to supplement their own production in order to meet delivery schedules.

20. Certain consumers require a particular grade, quality, size or mix of coals. No single producer may be able to supply the precise type of coal specified, thus necessitating a subcontract. The purchasing of coal by one producer from another is an essential marketing practice in the bituminous coal industry.

21. Prior to the effective date of the 1958 amendment to the National Bituminous Coal Wage Agreement, the legitimate commercial practices described in the preceding paragraphs had given rise to certain abuses. These abuses arose from the fact that coal produced in mines having substandard labor conditions can usually be purchased at prices below the cost of production in unionized mines. This results not only from the lower wages paid in substandard mines but also from the absence of contributions to any welfare fund, the lax observance of safety requirements and the generally lowered standards of working conditions and fringe benefits prevailing in these mines. Before December the 1st, 1958, some producers who were signatories to the

National Bituminous Coal Wage Agreement regularly purchased coal from substandard mines solely because of the cost differential. This occurred even though in many instances the purchasing producer had ample producing capacity available to satisfy his customers' requirements, and there were employees on layoff who were deprived of the employment opportunities which would have been available had their employer elected to produce all of the coal to be delivered to this customer rather than to purchase some from a substandard supplier.

22. UMW's Exhibits 16-20 demonstrate that wages paid in signatory mines are materially greater than those paid by operators in non-signatory operations.

23. It was customary for Riverton to buy supplemental coal in order to fulfill its contracts with buyers of coal. This coal was customarily commingled with coal mined by Riverton and was then washed and lump coal was screened out. In 1962 and 1963, the plaintiff Davison sold 2,170,000 tons of coal, of which 967,354 tons, or 44½%, was coal which had been acquired by Davison and Riverton from third persons not owned or controlled by Davison or Riverton or any affiliate thereof. A substantial part of that 44½% was produced from lands owned or leased by Riverton or Davison. Coal acquired by Riverton was purchased from mines signatory to an agreement with defendant Union and also from mines not signatory to an agreement with defendant Union. During the nine calendar months before April 1964, 78% of the coal purchased by Riverton came from non-signatory mines and 22% came from signatory mines. The base price of purchased coal was the same for signatory and non-signatory suppliers.

24. UMW has long sought to preserve work opportunities for its employee members by negotiating contractural restrictions upon the "contracting out" of work. The Appalachian Joint Wage Agreement (1941) reserved the right to strike "to preserve and maintain the integrity and competitive parity of this Agreement"; the Kanawha District Agreement of that year provided, "The practice of subcontracting and the hiring of back hands for the mining and loading of coal shall not be permitted"; a 1943 directive order of the National War Labor Board directed that each agreement contain a provision relating to leased mines that "Operators agree that they will not let any operating mines subject to this Agreement as a subterfuge" to avoid the Agreement's provisions; an identical clause was contained in the National Bituminous Coal Wage Agreement of 1945; and the 1952 Amendments to the National Agreement of 1950 read thus: "As a part of the consideration for this Agreement, the Operators signatory hereto agree that this Agreement covers the operation of all of the coal lands owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this Agreement, or acquired during its term which may hereafter (during the term of this agreement) be put into production. The said Operators agree that they will not lease out any coal lands as a subterfuge for the purpose of avoiding the application of this Agreement." The subcontracting provisions of the 1952 Agreement were carried forward in the 1958 Agreement. The 1964 and 1966 Agreements provided:

> "As part of the consideration for this agreement, the Operators signatory hereto agree that this agreement covers the operation of all of the coal lands, coal producing and coal preparation facilities owned or held under lease by them, or any

> of them, or by any subsidiary or affiliate at the date of this agreement, or acquired during its term which may hereafter (during the term of this agreement) be put into production or use. The Operators agree that they will not lease, license or contract out any coal lands, coal producing or coal preparation facilities for the purpose of avoiding the application of this agreement or any section, paragraph or clause thereof."

25. The so-called "subcontracting" and "to what land does this contract apply" clauses (including the Protective Work Clause in the 1958 agreement—see infra) were bargained for by UMW in a sincere effort to stop the employers' practice—which was prevalent—of avoiding the burdens (to the employer) of a union contract by the legalistic subterfuge of "leasing" or "dummying." The contractual provisions up to 1964 did not do much good; the purpose of maintaining "unit work" for the employee "unit" or "units" (whether one considers the units as industry, multiemployer, or individual) was not accomplished. The purpose and intent of the Union in negotiating these clauses, including the Protective Work Clause of 1958, was primary and not secondary. "Substitute coal" in this area means coal a producer could readily produce himself but chooses to buy from others. "Supplemental" coal in this area means coal a given producer cannot produce himself, either from a quantity problem or a quality problem. What is substitute and what is supplemental is not a black and white area—it is decidedly "grey." In this case, for example, (a) when plaintiff's Fields Creek mine (231,000 tons produced in 1963) ran out in 1963 it was promptly replaced by a new mine, or greater production, so that Riverton's 1964 production exceeded Riverton and Field Creek in 1963; (b) when the 80 cent constraint caused Riverton to cease

buying from non-union operators, Riverton increased its own overall production so that the total tonnage handled by the plaintiffs in 1964 and 1965 compared favorably (a little less) with what was handled in 1963 and 1962. This record does not explain why financial ability to expand production (1964-65) was missing in 1962-63. The point is, that with the difficulties in differentiating between supplemental and substitute, and the employees' unquestioned primary interest in "substitute," the conglomerate became a legitimate primary target.

26. The 1958 Agreement contained the so-called Protective Work Clause (PWC) which provided:

> ". . . the Operators agree that all bituminous coal mined, produced, or prepared by them, or any of them, or procured or acquired by them or any of them under a subcontract arrangement, shall be or shall have been mined or produced under terms and conditions which are as favorable to the employees as those provided for in this Contract."

A further provision of the clause provided:

> ". . . any operator signatory hereto who is a party to any agreement inconsistent with the obligations assumed hereunder shall not maintain such inconsistent agreement in effect beyond the first date at which such agreement may be terminated by him in accordance with its terms."

PWC was included in the contract hammered out in Washington on December 3, 1958, by the BCOA and the UMW, was signed by SCPA on December 4 and by most other non-captive mine operators in the industry by January 1, 1959 (including Riverton). The "hammered" out contract became industry-wide (for union employers) involving some 80% of total production.

27. The "United Mine Workers of America Welfare and Retirement Fund of 1950" was created under the provisions of Section 302(c)(5) of the Labor Management Relations Act, 1947. Beneficiaries under the said Welfare and Retirement Fund Plan were by its terms limited to employees of signatories, their families and dependents. Only operators whose employees are represented for purposes of collective bargaining by and who are signatory to a collective bargaining agreement with the defendant Union make contributions to the said United Mine Workers of America Welfare and Retirement Fund of 1950.

28. Effective December 1, 1958, Riverton entered into a written collective bargaining agreement with the defendant, which, by its terms, was:

> "* * * effective as of December 1, 1958, and is not subject to termination by any party signatory hereto prior to November 30, 1959, PROVIDED HOWEVER, That either the parties of the first part or the party of the second part may terminate this Agreement on or after November 30, 1959, by giving at least sixty (60) days' written notice to the other party of such desired termination date."

The agreement of 1958 by its terms "amends, modifies and supplements and, as amended, modified and supplemented, carries forward and preserves the terms and conditions of the 'National Bituminous Coal Wage Agreement of 1950 as Amended September 29th, 1952,' the 'National Bituminous Coal Wage Agreement of 1950' and all previous Agreements as therein provided." Among the provisions of the National Bituminous Coal Wage Agreement of 1950 referred to and incorporated therein was a provision entitled "Settlement of Local and District Disputes" which provided as follows:

"Should differences arise between the Mine Workers and the Operators as to the meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences immediately:

"1. Between the aggrieved party and the mine management.

"2. Through the management of the mine and the Mine Committee.

"3. Through District representatives of the United Mine Workers of America and a commissioner representative (where employed) of the coal company.

"4. By a board consisting of four members, two of whom shall be designated by the Mine Workers and two by the Operators.

"5. Should the board fail to agree the matter shall, within thirty (30) days after decision by the board, be referred to an umpire to be mutually agreed upon by the Operator or Operators affected and by the duly designated representatives of the United Mine Workers of America, and the umpire so agreed upon shall expeditiously and without delay decide said case. The decision of the umpire shall be final. Expenses and salary incident to the services of an umpire shall be paid equally by the Operator or Operators affected and by the Mine Workers.

"A decision reached at any stage of the proceedings above outlined shall be binding on both parties hereto and shall not be subject to reopening by any other party or branch of either association except by mutual agreement."

The said National Bituminous Coal Wage Agreement of 1950 as Amended September 29, 1952, provided on page 3 thereof:

> "3. The United Mine Workers of America and the Operators agree and affirm that they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the 'Settlement of Local and District Disputes' section of this Agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract provided and by collective bargaining without recourse of the courts."

29. In August of 1963 a panel of the NLRB concluded that PWC violated 8(e) of the Act. (Lewis, et al, 144 NLRB 228, 54 LRRM 1037.) The so-called 80-cent clause involved in this case was the direct and inseparable result of an effort by the Union to devise a "legal" substitute and "collectively bargain" it through. The result was the inclusion of the 80-cent clause and "application to coal lands" clause in the contract. The provisions follow:

> **"UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950**
>
> "Amend the first printed paragraph of subsection A of this clause by striking out all of the second sentence beginning with the word 'during' and ending after the word 'sale' and inserting in lieu thereof the following: 'During the life of this agreement there shall be paid into such Fund by each Operator signatory herete the sum of forty cents (40¢) per ton of two thousand (2,000)

pounds on each ton of bituminous coal produced by such Operator for use or for sale. On all bituminous coal procured or acquired by any signatory Operator for use or for sale, (i.e., all bituminous coal other than that produced by such signatory Operator) there shall, during the life of this Agreement, be paid into such Fund by each such Operator signatory hereto or by any subsidiary or affiliate of such Operator signatory hereto the sum of eighty cents (80¢) per ton of two thousand (2,000) pounds on each ton of such bituminous coal so procured or acquired on which the aforesaid sum of forty cents (40¢) per ton had not been paid into said Fund prior to such procurement or acquisition.'

"Amend the eleventh printed paragraph of subsection A by substituting a semicolon for the period at the end of the first sentence and adding the following: 'together with a monthly statement showing the full amount due hereunder on all bituminous coal procured or acquired from any mine, preparation plant or facility other than those owned or operated by such signatory Operator, all as hereinabove set out and provided.'

"Amend the second sentence of the thirteenth printed paragraph of subsection A by inserting a comma after the word 'mine' and then adding the following: 'preparation plant or other facility' and further amend the thirteenth paragraph by striking out the words 'obligation hereunder' at the end of the paragraph and substituting in lieu thereof the following: 'any of the obligations hereunder.'

APPLICATION OF CONTRACT TO COAL LANDS

"Amend the section denominated 'Application of Contract to Coal-Lands' by striking out the language of that section and inserting in lieu thereof the following:

> 'As part of the consideration for this agreement, the Operators signatory hereto agree that this Agreement covers the operation of all of the coal lands, coal producing and coal preparation facilities owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this Agreement, or acquired during its term which may hereafter (during the term of this Agreement) be put into production or use. The Operators agree that they will not lease, license or contract out any coal lands, coal producing or coal preparation facilities for the purpose of avoiding the application of this Agreement or any section, paragraph or clause thereof.' "

The said amendment effective April 2, 1964,[1] also amended the "Termination of Agreement" provisions of the 1958 agreement by substituting the following language therefor:

> "This amended agreement dated March 23, 1964, shall be effective April 2, 1964, and is not subject to termination by any party signatory hereto prior to March 31, 1966, PROVIDED, HOWEVER, That either the parties of the first part or the party of the second part may terminate this Agreement on or after March 31, 1966, by giving at least sixty (60) days' written notice to the other party of such desired termination date."

30. Riverton became a signatory to the 1958 agreement voluntarily. The method was as a multiemployer "negotiator" or "fiat." The method was via SCPA which represented Riverton for negotiating and signing purposes.

31. On August 27, 1963, as noted above, the NLRB, by its Chairman and two members, found PWC in the 1958 Agreement to be within the ban of the Act's Section 8(e) [144 NLRB 228, 54 LRRM 1037]; and on December

[1] Being the date BCOA and UMW formalized and signed the agreement arrived at in late March.

12, 1963, the Board, acting upon a motion for reconsideration *en banc*, entered an order stating its inability to arrive at a majority decision. The 80-cent clause in the 1964 Agreement resulted from the NLRB holding that the protective wage agreement was violative of law and PWC was then substituted by the 80-cent clause. In an attempt to protect the work opportunity of UMW members by contractual provisions against subcontracting UMW sought to have the substitute clause in the contract providing for $1.00 payments into the Welfare Fund; the operators rejected the suggestion; and the negotiators of UMW and of the operators finally agreed on 80 cents a ton (the operators were, of course, the multiemployer representatives).

32. Prior to and at the time PWC was negotiated in 1958 and to and at the times the 80-cent clause was negotiated (at the multiemployer levels) in 1964 and 1966 "subcontracting" (a misnomer, really—more accurately it was leasing and subleasing and using various means to reap economic advantage for producers by [what tax lawyers would refer to as split-up or spin-off, or subsidiarizing[2]] loosening up coal lands and coal miners' work from union contracts) was a real and not fancied problem. The *primary* target of the union—intent—in bargaining out PWC was unquestionably subcontracting. The clause was directed at (1) job security, (2) welfare fund integrity. Whatever the unit, that was the real primary intent. Obviously, the parties [Union and employer(s)] recognized that it could and would also call for and result in additional unionization. That was a secondary result within contemplation at the time of bargaining —it was an incidental purpose and/or result. It is a fact.

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[2]This is, of course, "quasi"—since the subcontractees were not controlled by the operators.

and so found on this record, in the language of the District of Columbia Circuit that "the 80 cent clause is, by everyone's admission and our characterization, a substitute for the union standards clause (PWC)." (Union v. N.L.R.B., 399 F.2d 977 (1968), at 980, 68 LRRM 2664) It is found, therefore, that the primary purposes of the somewhat enforced *substitute* (80% clause) were the same as the original (PWC), i.e., to protect the jobs and work of signatory employees and maintain the integrity of the Welfare Fund.

33. The National Bituminous Coal Wage Agreement of 1950, as amended in 1958, by its terms was not subject to termination prior to November 30, 1959, and thereafter was subject to termination by a party thereto by such party giving at least sixty (60) days written notice to the other of its desire to terminate the agreement. Neither Riverton nor UMW has ever given to the other party to the Riverton-UMW 1958 contract a notice of termination and the 1958 contract was in full force and effect at all times up to April 15, 1964, to the full knowledge of UMW and its agent, District 17. BCOA and SCOA had waived the notice but Riverton had not and neither BCOA's or SCOA's or Kanawha Association's waiver in any wise affected Riverton. The union employees of Riverton did, in fact and law, have a binding contract extending to April 15, 1964, at least, i.e., the 1958 contract negotiated by the employees' bargaining agent.

34. During the fall of 1963 the UMW, through District 17, specifically called to the attention of plaintiff the fact that it was doing business with non-union operators operating under leases from plaintiff on lands controlled by plaintiff and the purpose was to secure plaintiff's "help" in organizing these operators in exchange for a

Union "consent" to a business enterprise plaintiff was interested in.

35. On or about April 2, 1964, Field Representative Emery McCoy warned Lewis Davison, President of Riverton, at the Crown Hill office of Riverton, that "there probably will be trouble" when Riverton's employees represented by the defendant Union found out that Riverton had not yet signed a new collective bargaining contract.

On the evening of Friday, April 19, 1964, Arby McCoy, Financial Secretary and Chairman of the mining committee of Local 1209, and Edward Perry, a member of the Union mining committee, both of whom were employees of Riverton, began stopping trucks entering the Riverton river tipple at Crown Hill. A work stoppage commenced and continued until the evening of April 15, 1964.

On April 13th, Lewis Davison went to the District headquarters of the defendant Union in Charleston and asked District President Humphreys for a copy of the 1964 proposal which the defendant Union wanted Riverton to sign. Humphreys handed Davison a printed document entitled "National Bituminous Coal Wage Agreement of 1950 as Amended effective April 2, 1964." Davison asked Humphreys, "Well, what is it going to take to get the men back to work?" Humphreys answered, "Sign the contract." Davison declined to sign until Riverton's attorneys had approved the document.

On April 13, 1964, Riverton wired W. A. Boyle, President of the defendant Union, and Raymond Humphreys, stating:

"TO SETTLE THIS ILLEGAL STRIKE WE ARE WILLING TO SIGN THIS AGREEMENT AND PUT THE WAGE INCREASE INTO

EFFECT IF YOU WILL ELIMINATE TWO SECTIONS ENTITLED 'UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950' AND 'APPLICATION OF CONTRACT TO COAL LANDS.' WE ARE ADVISED THAT THESE TWO CLAUSES ARE ILLEGAL. ARE YOU WILLING TO OMIT THEM OR SUGGEST MODIFICATIONS WHICH WILL BE LEGAL? WE ARE WILLING TO CONTINUE THE WELFARE AND RETIREMENT FUND PROVISIONS OF OUR CURRENT CONTRACT WITH YOUR UNION FOR THE DURATION OF THE NEW AGREEMENT PAYING 40¢ PER TON INTO THE FUND AS IN THE PAST ON EACH TON OF BITUMINOUS COAL PRODUCED BY US FOR USE OR SALE."

On the following day, R. O. Lewis, Vice President of the defendant Union, telegraphed Riverton from Washington, D.C., stating:

"REURTEL CONCERNING ILLEGAL STRIKE AT RIVERTON. YOU ARE ADVISED THAT YOUR COMPANY WAS SIGNNATORY TO 1958 AGREEMENT BY VIRTUE OF KANAWHA OPERATORS ASSOCIATION SIGNATURE. THE ASSOCIATION HAS NOW EXECUTED A NEW AGREEMENT THEREBY VOIDING THE EARLIER AGREEMENT AND YOUR COMPANY HAS REFUSED TO PERMIT THE ASSOCIATION TO SIGN FOR YOU. THE UNION IS NOT INVOLVED IN THE STOPPAGE. IT IS A VOLUNTARY PROTEST OF YOUR EMPLOYEES AGAINST YOUR FAILURE TO EXECUTE THE NEW AGREEMENT. WITH REFERENCE YOUR REMARKS ON APPLICATION OF CONTRACT TO COAL LANDS AND THE WELFARE FUND SECTION OUR ATTORNEYS EXPRESS THE OPINION THAT THESE SECTIONS ARE LEGAL AND WE DO NOT ANTICIPATE CHANGING THE AGREEMENT ON THE BASIS THAT YOUR ATTORNEYS ARE TRYING TO USURP THE PEROGATIVES OF THE PROPERLY CONSTITUTED COURTS OF THIS COUNTRY. MAY WE EXPRESS THE HOPE THAT YOUR COMPANY WILL JOIN THE GREAT MAJORITY OF THE COAL COMPANIES OF THIS COUNTRY IN BECOMING SIGNATORY TO THE 1964 AGREEMENT."

36. On April 15th, following receipt of the said telegram from R. O. Lewis, Riverton notified the defendant Union that in order to end the strike, it would sign the contract and asked the Union to send Emery McCoy out to Crown Hill with copies of the printed form. About 1:30 P.M. on that day, Emery McCoy and several members of the Local Mine Committee came to the plaintiffs'

office at Crown Hill and presented the printed contract forms to Lewis Davison for his signature. Davison signed the printed document entitled "National Bituminous Coal Wage Agreement of 1950 as Amended Effective April 2, 1964," stating that he was doing so "under protest, under coercion because of illegal strike," whereupon McCoy turned to the local committee and said, "Get the men back to work on the evening shift." The employees then promptly returned to work.

37. The defendant and its agents of District 17, including the Field Representative Emery McCoy, had knowledge on and before April 10, 1964, that members employed by Riverton believed their collective bargaining agreement was about to terminate and that members might not work without a contract, i.e., the officials knew that the men working in the mines, on learning of the end of the BCOA-UMW negotiations in March, 1964, and the contract formalization in early April, concluded that ended all existing contracts and made "scabs" of them if they worked for any operator who had not, one way or another, signed the newly negotiated contract. These agents also knew that the Riverton contract had not been terminated, that no termination notice had been given by either party, and that the contract would remain in full force and effect for at least sixty days after such a notice was given. With full knowledge of the men's belief they took no steps to advise the members that the contract had not been terminated and would continue to remain in full force and effect. Instead, Field Rep. McCoy authorized by District 17 and defendant to handle the Riverton matter and the Union's "man" in charge on the spot, threatened "trouble" if Riverton did not sign the new printed form of agreement. When Riverton employees in effect asked agent Emery McCoy if Riverton

and UMW still had a contract, he "told them that they didn't have one." For many years, as McCoy knew, the defendant Union has had a tradition of "no contract, no work." The defendant Union made no effort to "maintain the integrity" of the existing contract by referring the "differences" and "local trouble" to the "Settlement of Local and District Disputes" provisions of the 1950 agreement as required by that agreement and subsequent amendments. As an ultimate finding of fact, the action of the District representatives, in its context, was the equivalent of a "signal" to "strike" and was so intended by the District Representatives and the men. The Union instructed its members to strike, not by direct viva voce but in "union lingo"—as well understood by all concerned as is the Blackwood referred to now, by some, as "Back-woods" convention by a bridge player.

38. While it is true that after the strike the defendant's agents took no steps to end the strike until Riverton signed up (in that connection this Court, on a credibility basis, rejects entirely the testimony of the McCoys—their testimony was not only "less than candid" [a phrase used before in this overall controversy by an NLRB examiner] but in fact was obviously impelled by what each thought he *ought* to say—not coached, of course, but as a matter of self-initiation), took no disciplinary measures against any Union local officer or member for participation in an "unauthorized" strike, took no affirmative step at all to end it, this Court attaches no weight to such. In Mine Workers v. Gibbs, 383 U.S. 715, (1965) at 739, 61 LRRM 2561, the Court said:

> "There can be no rigid requirement that a union disavow such unlawful acts as may previously have occurred."

Also that part of Coronado, 259 U.S. 344 (1921), 268 U.S. 295 (1925), which survived subsequent statutory enactments leads this Court to conclude that UMW cannot be held responsible under any theory of passivity. Something affirmative is required before a conclusion of "union authorization" is justified. We find that requirement in the "integrity" provision of the 1958 agreement and in the quasi-affirmative expression of District 17 on April 10, 1964, that there was no contract between Riverton and the Riverton workers. There was.

39. An object of the April, 1964, strike at Riverton was to force or require Riverton to enter into the proposed 1964 printed form amendment to the National Bituminous Coal Wage Agreement of 1950. Another object of the said strike was to force or require Riverton and Davison to cease using, selling, handling, transporting or otherwise dealing in the products of coal producers who were not signatories to an agreement with the defendant Union and to cease doing business with such producers. Another effect of the said strike was to encourage coal producers selling coal to Riverton or Davison to recognize or bargain with the defendant Union as the representative of the employees of such producers even though the defendant Union had not been certified as the representative of such employees under the provisions of Section 9 of the Act. After Riverton signed the 80-cent clause, and as a result thereof, some fifteen non-union producers from which Riverton had been buying supplemental coal became signatories to the UMW agreement. Some twenty-two did not—so the effect was not to "force" or "compel" but to encourage. Such "encouragement" was not a primary object of the strike—it was a recognized incident. The design or purpose or object remained—job protection.

40. Following the execution by Riverton of the 1964 amendment to the agreement with the defendant on April 15, 1964, Riverton bought no more coal from non-signatory suppliers. This was because, under the new agreement, the terms of the agreement were applicable to all suppliers of Riverton or Davison and a Welfare Fund payment of 80 cents a ton was required to be paid on all coal bought from non-signatories. Thereafter, Riverton was unable to make up its loss of volume of coal by purchase from other sources. Supplemental coal could not be acquired within a range of economic delivery at a price which Riverton could pay and realize a profit.

41. The 1964 Agreement was to continue in effect until March 31, 1966, and was subject to termination on or after the date by either party giving sixty days notice thereof in writing. UMW did not give Riverton a notice of termination of the agreement. During the term of the said 1964 agreement, Riverton was shut down again by a strike which began on April 12, 1966. In order to end the strike, Riverton was asked to sign and on or about April 27, 1966, agreed to sign a new printed form agreement entitled "National Bituminous Coal Wage Agreement of 1950 as Amended Effective April 1, 1966." The strike ended as soon as the plaintiff, Riverton, agreed to sign the new form agreement. The printed form agreement was subsequently executed by plaintiff, Riverton, on May 3, 1966, but prior to execution the defendant Union was informed in writing that the provision of the printed form entitled "United Mine Workers of America Welfare and Retirement Fund of 1950" was unlawful and that Riverton was signing "under protest."

The said document entitled "National Bituminous Coal

Wage Agreement of 1950 as Amended Effective April 1, 1966" carried forward and preserved the terms and conditions of the said previous agreements, including the 40-80 cent welfare clauses, and this addition thereto:

> "As part of the consideration for this agreement, the Operators signatory hereto agree that this agreement covers the operation of all of the coal lands, coal producing and coal preparation facilities owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this agreement or acquired during its term which may hereafter (during the term of this agreement) be put into production of use. The Operators agree that they will not lease, license or contract out any coal lands, coal producing or coal preparation facilities for the purpose of avoiding the application of this agreement or any section, paragraph or clause thereof."

At the multiemployer-Union level the 1966 negotiations were not concerned with the 80-cent clause. The bargaining concerned other subjects, e.g., increased wages, etc.—the duration of the negotiations at the multi-level and not any 40-80 cent clause caused the sporadic and wildcat strikes in general in April of 1966.

42. The Riverton employees ceased work on April 12, 1966, and returned to work on April 27, 1966. The immediate cause of the work stoppage was a picket line established at Riverton and elsewhere by dissident members of UMW Local Union 8843. The indirect cause of the unrest which affected not only Riverton but other area mines as well, was dissatisfaction with the progress of bargaining negotiations then going on between BCOA and the Union. Neither the work stoppage nor the wage negotiations then under way or which thereafter occurred in 1966 was concerned with the 80-cent clause or the Land

Lease clause; they were concerned with other economic factors. UMW did not, nor did District 17 or any of its agents, authorize or ratify the work stoppages at Riverton or elsewhere, nor did either authorize or ratify the picket lines of Local Union 8843. As of April 11, 1966, there were several area mines involved in the work stoppage and UMW's International Officers directed District 17, by telegram, to instruct the men to return to work pending the outcome of the negotiations. District 17 thus advised the groups of men involved. The District informed the members of Locals 8843 and 1209 of the international's telegram and called upon them to return to work. The men refused to return in spite of those efforts. While this situation prevailed, UMW succeeded in reaching an agreement with BCOA. Most area mines, including Riverton, made known their intention to sign the agreement and thereupon the Riverton men resumed work. As in 1964, Riverton signed the wage agreement individually, and although the so-called "80-cent" clause based on the claimed illegality thereof. The defendant took no affirmative action, other than above described, to end the strike, but, as noted above, it did not ratify by such inaction—nor did it encourage as in the case of the strike at Riverton in 1964.

As the Bureau of Labor Statistics, United States Department of Labor, reports in its Bulletin No. 1558 dealing with wage chronology in the bituminous coal mines, 1933-68, recites:

> "On April 11, 1966, in the absence of agreement on the union's proposals, about half of the industry's mines were closed by a walkout, and remained closed until an agreement reached on April 24 was ratified by the workers and signed by the parties on April 27. The parties to the earlier

settlement at mines in the midwest rescinded that agreement on April 27 and on the same date signed an agreement identical to that negotiated by the Bituminous Coal Operators' Association."

43. The object of the 1966 strike was not related to the 40-80 cent clause. At Riverton and elsewhere it was to force a conclusion, favorable to the Union, of the multi-employer negotiations which were not concerned with the 80-cent clause or the Coal Lands clause.

44. Riverton did not after execution of the 1966 amendment purchase coal produced by operators who had not signed the current UMW agreement.

45. Under UMW's Constitution, local union officers are elected by secret ballot of local union members and local union officers are paid from dues allocated to a local union pursuant to UMW's Constitution. Regular local union meetings are scheduled pursuant to bylaws of locals unions; and special meetings are called either by the local union's president or members thereof who request the calling of such special meeting.

Article XVI of the UMW Constitution provides that "No District shall be permitted to engage in a strike involving all or a major portion of its members, without the sanction of an International Convention or the International Executive Board." There is no evidence in this record that either the 1964 or 1966 strike in District 17 involved any such majority. Clearly the 1964 strike did not and the indications are the one in 1966 did not either. In 1951, 1956 and again on September 23, 1966, UMW's Executive Board advised its membership of its policy against unauthorized work stoppages, declaring in the September, 1966, advice "hereafter when it is proven that any member or members were engaging in promoting,

conducting or prolonging an unauthorized work stoppage, such member shall be penalized the sum of five dollars for each day of such unauthorized stoppage" in addition to any penalty imposed upon the local union involved..

The District took no steps to penalize Riverton's striking employees. To invoke a penalty against a member, charges must first be filed against him within his local union; he has a right of notice of the charges and he has a right to appeal his conviction. District 17's president had personal knowledge of both the 1964 and 1966 unauthorized strikes at Riverton and could have filed charges. Each of the contracts (1958 and 1964) was in effect a no-strike contract. See Lewis v. Benedict, 259 F.2d 346, 43 LRRM 2237 (6th, 1958), aff'd. (equally divided court) 361 U.S. 459, 45 LRRM 2719, and Teamsters Local v. Lucas Flour, 369 U.S. 95, 49 LRRM 2717 (1962). Since

a) as indicated above, this Court attaches no significance to any union inaction: and

b) this is not a 301 case

this finding No. 45 had no effect on the decision of this Court.

46. After plaintiff had executed the 1958 agreement with UMW containing the PWC, under which plaintiff agreed not to buy coal from operators whose employees worked under terms less favorable than UMW members, and specifically in 1959, 1960 and 1961, while that contract was in effect, plaintiff did in fact buy substantial amounts of coal from 32 operators (some union and some non-union) whose workers did in fact work under less favorable conditions. Of the 32—some of whom did not sell to plaintiff on a regular basis—14 operated on

land controlled by plaintiff (4 of the 14 on a purely oral lease). There is no evidence that plaintiff knew that the 32 were operating under substandard (from a point of view of union standards) conditions (which they were in fact), nor that the defendant knew that the union operators included in the 32 were.

The plaintiff became involved in a Walsh-Healey proceeding as a result of furnishing coal which had been acquired from the 32 operators on a Government contract (see 16 WH Cases 767 (1964)) which was eventually affirmed by a Federal Circuit Court. The record in that case does establish that the plaintiff, as an individual employer, was doing substantial leasing (or subcontracting if one would so describe it) and that the leasing bore some relationship with sub-union-standard wages and working conditions. For the wage part of it see, in addition to the W.H. report, Pennington, 381 U.S., at 660 and 671. This Court does not regard the knowledge or lack of knowledge of the activities of the 32 operators by either party to this case as of any import. The import of the Walsh-Healey record in this case is that it demonstrates that elimination of leasing was a legitimate bargaining target for the union in its 1958 and 1964 contracts with the plaintiff as an industrial employer, both from a union standards point of view and a protection of jobs point of view. There is no question but that, at all times of import to this case, plaintiff controlled sufficient coal properties which, if worked by plaintiff, would have resulted in supplying all coal desired by all of plaintiff's customers.

47. During 1962-63, Riverton's purchases of coal from third persons averaged 40,000 tons a month. In March, 1964, the last month before the 80-cent clause became

effective, Riverton's purchases were 41,568 tons. In the first month after the 80-cent clause became effective, purchases were 26,119 tons. During the remainder of the calendar year 1964, they averaged 24,930 tons a month. In the calendar year 1965, tonnage purchased averaged less than 23,000 tons a month. In 1966, the average was 21,194 tons and in 1967 was 26,800 tons. The reduction in purchases of supplemental coal by Riverton after April, 1964, were a consequence of the coal lands clause and the 80-cent penalty provision included in the 1964 agreement which Riverton signed as a result of the strike action of April 10-15, and in the 1966 agreement.

48. Before January 1, 1964, purchased coal was loaded and shipped through both the Crown Hill dock, operated by Riverton, and the Marmet dock, operated by Davison. After January 1, 1964, almost all purchased coal was shipped through the Marmet dock, then operated by Riverton. Cincinnati Gas & Electric Company is referred to as a "low realization customer." Others are referred to as "high realization customers."

The percentage of coal shipped by Riverton to high realization customers through the Marmet dock during the years in question was as follows:

April 10 to December 31, 1964	82.75%
January 1 through December 31, 1965	83.36%
January 1 through August 31, 1966	90.01%
September 1 through December 31, 1966	95.22%
January 1 through December 31, 1967	93.94%
January 1 through September 30, 1968	98.58%

The plaintiffs received a substantially higher realization per ton on coal sold to high realization customers than on coal sold to low realization customers.

49. All deliveries of coal to Riverton, and consequently by Riverton to its customers, declined in the spring of 1964 following execution of the 1964 amendment.

50. The 1964 and 1966 agreements of Riverton with the defendant Union were entered into by Riverton with the knowledge and acquiescence of Davison. By their terms they made Riverton responsible for the payment of an 80-cent per ton penalty to the United Mine Workers fund on all coal purchased by Davison from non-signatories. On January 30, 1964, Davison entered into a written agreement with Ford Coal Company, under which Davison agreed to buy 1,000 tons a day of strip and auger coal between 12,800 b.t.u. and 13,000 b.t.u. for a price of $3.85 a ton. The agreement was to extend for a period of two years.

51. After entering into the 1964 amendment to the National Bituminous Coal Wage Agreement, Davison notified Ford that it could and would not purchase its coal unless Ford became a union operator. Ford refused, whereupon plaintiff breached its contract and refused to buy. The breach and refusal were caused by the 80-cent clause in the 1964 contract. In May, 1964, Ford sued Davison in the Circuit Court of Kanawha County, West Virginia, alleging a breach of contract and damages of $850,000. On June 23, 1964, the suit was compromised for $15,000. As a further part of the settlement, Davison agreed to sell, as Ford's agent, up to 20,000 tons a month of Ford's production for a 7% commission. This agreement was for a two-year period. This was practically the same amount Davison had agreed to purchase under its January 30, 1964, contract. Such coal was to be delivered to Ford's dock at Coalburg, West Virginia. The contract (sales agency) did provide that Ford was to be free to

sell its coal elsewhere if it could get a higher price than Davison agreed to sales-agent it for. The sales-agency price was $4.29 a ton (about $3.99 net of commission) vs. the January contract purchase price of $3.85 a ton.

Prior to execution of the 1964 wage agreement Ford, though projected to furnish 1,000 tons per day, furnished Davison, and Davison purchased the following tonnage:

January, 1964	5875 tons
February	4165 tons
March	9743 tons
April	3746 tons

After execution of the June 23, 1964, sales agreement, under which Davison was exclusive sales agent for Ford's first 21,000 tons per month, Davison sold the following tonnages of Ford's coal:

July, 1964	7335 tons
August	13032 tons
September	9272 tons
October	3698 tons
November	937 tons

The only Ford tonnage sold thereafter by Davison was 919 tons in October, 1965, and some tonnage in 1966.

Under the sale agency agreement between Ford and Davison signed June 23, 1964, effective July 1, 1964, through June 30, 1966, Ford and Davison substituted a new mutual obligation to deal with one another on coal mined by Ford in substantially the same quality and quantity as provided in their January 30, 1964, purchase and sales agreement. There is no explanation in evidence why Ford did not sell through Davison the stipulated tonnage under the sales agency agreement after November, 1964. The reasons why Ford thereafter offered Davison virtually no coal to sell were not brought out

by plaintiff, but none of the possible reasons—lack of production, low quality coal, Ford's disregard of the sales agency agreement—can be attributed to the UMW. While the plaintiff has shown that it cancelled the Ford contract because of the constraint involved in the 80-cent clause, it has failed to show, by a preponderance of the evidence, that the constraint actually resulted in a deprivation to it of coal tonnage. Ritchie v. UMW, 410 F.2d 827, 71 LRRM 2212 (6th, 1969), infra, directs that the plaintiff in this type of case has the burden of proving a direct and proximate casual relationship by a preponderance. Under ordinary circumstances a court should and would rely on the presumption that a party who contracts, such as Ford, had the ability to perform—and that presumption, by itself, could furnish the foundation on which preponderance would rest. However, the evidence affirmatively shows in this case that Ford did not or could not perform its contract during the first quarter of the January 1964 purchase and sales Agreement—it either could not or did not perform it by more than 50% of its obligation. While there is a hint that higher coal prices, which Ford may have been able to get after the sales agency agreement was signed, furnished the reason; nonetheless in this record there is no evidence that Ford did or could have gotten higher prices. There is no evidence except that Ford, under a binding sale-purchase contract, could not live up to it for a three-months period, plus evidence that Ford did not subsequently, under the sales agency contract, furnish tonnage in any amount approaching the original contract amount even though the price under the sales agency contract to Ford was more advantageous than the price under the cancelled sales-purchase agreement. If Ford actually had been producing 20,000 tons a month and selling it after the date

of the sales agency agreement, such could easily have been established. Under the evidence in this record, this Court would simply be guessing on whether Ford would or could have produced any more tonnage than it turned over to plaintiff under the sales agency agreement. There is no evidence at all in this record about Ford's performance vis-a-vis 1000 tons a day after the sales agreement was entered into. There is some evidence that Ford's coal was not much count and it was not contradicted. "A fortiori" this Court may not assume or find that the contract of sale and purchase would be renewed for another two-year period after its original term. That is sheer speculation on this record which is demonstrated rather glaringly by a comparison of Ex. 9 (the companies Riverton was buying from in 1963) and Ex. B (paragraph 5). The tenure of a supplier to Riverton was rather brief. Also, one should note that the inclusion of the Ford 20,000 a month in the basis for loss of profit damage would involve a determination that the plaintiff, which had dealt in 483,000 tons of purchased coal a year in preconstraint years, would have purchased 800,000 tons in 1965—a year in which its own production had increased almost 200,000 tons over 1964. In the period 1959 to 1967, inclusive, the plaintiff(s) sales amounted, in round figures, to about a total of 1,000,000, tons a year, give or take 10% or so. For examples—

1960	1,094,000
1964	1,053,000
1965	1,141,000

This Court would simply be guessing were it to conclude that a company which sold 1,131,424 tons (produced and purchased) in 1963 (the last preconstraint year) would have produced, purchased and sold 1,600,000 in

1965, the first full constraint year. Conclusorily, the Ford item is excluded from any loss of profit consideration.

52. As a part of the 1964 Ford suit and settlement, Davison's attorney fees and expenses amount to $1,793.46. This damage of $1,793.46 to the plaintiff was proximately caused by the 80-cent clause in the 1964 agreement. And it was within the contemplation of the parties. See the 1958 agreement in which "existing agreements" were specifically excepted — indicating such matters were usually contemplated. No such exception was contained in the 1964 agreement.

53. Following execution of the April 1964 agreement, plaintiff Riverton initiated unfair labor practice charges against the defendant Union with the National Labor Relations Board, alleging that the said 80-cent clause violated Sections 8(b)(4) and 8(e) of the Act. This case is still pending before the Board following remand by the United States Court of Appeals for the District of Columbia subsequent to an original Board decision in Riverton's favor in the proceeding. Prosecution of the case entailed substantial expense and attorneys' fees paid by Riverton in the amount of $20,294.97 as of March 1968. This damage to plaintiff proximately resulted from the 80-cent clause and was reasonably forseeable. The point is made that only expenses related to the filing of the charge should be included. We disagree. Plaintiff had a right to appear by counsel in the proceedings before the NLRB and appeal therefrom—in addition, it was by the Board's invitation. The reasonableness of the need for counsel is for the client's determination[3]—and, as the

[3]Subject to a Court "overcall" only for rather clear unreasonableness. History (see No. 3 in Conclusions, infra) testifies to the unreasonableness in this instance.

defense of this case indicates, that often results in the representation by more than one lawyer.

54. During the strike of April 10-15, 1964, plaintiff Riverton incurred unavoidable continuing fixed costs and expenses in the amount of $13,095.57. During the strike of April 12-27, 1966, plaintiff Riverton incurred unavoidable continuing fixed costs and expenses in the amount of $36,128.50.

55. Plaintiff historically purchased about 40,000 tons a month (1962-63). In the period March 31, 1964, to March 31, 1966, inclusive, the repetition of history would have resulted in the purchase of (24 x 40,000) or 960,000 tons. Plaintiff actually purchased 538,000 tons (an approximate figure). The deficiency for the period is therefore 422,000 tons.

56. On the same historical basis, purchases for the period April, 1966, to and through September 30, 1968, would have been (30 x 40,000) or 1,200,000 tons. The actual purchases were 640,000 tons, a deficiency of 560, tons.

57. The plaintiff has shown, by a preponderance, that during the period April, 1962, through 1968, it was unable to fill orders on hand to approximately 800,000 tons—of which approximately 360,000 tons is applicable to the period April 1, 1964, to April 1, 1966, and the balance of 440,000 tons is applicable to the period April 1, 1966, to September 30, 1968.

58. The defendant claims that in order to maintain a loss of profit claim on coal it was unable to buy because of the 80-cent clause the plaintiff must show that there were non-signatory producers in the vicinity. The plaintiff directed no evidence as such at that. However, this

record shows (1) that there remained a substantial number of operators with which plaintiff did business before April 15, 1964, who did not become signatory and were eliminated as suppliers for that reason (i.e., the 80-cent clause reason) and (2) at all times from 1959 to April, 1964, the plaintiff was able to purchase very substantial amounts of coal from non-signatories. There is no reason not to apply the presumption of continuance and this Court, based thereon, finds that the plaintiff could have purchased from non-signatory operators the difference between what it usually brought (historically—1962 and 1963) and what it did buy in the period April 1, 1964, to September 30, 1968. It is therefore found that as a proximate result of the 80-cent restraint the plaintiff did not (but could have) buy from non-signatory operators—

In the period 4/1/64 - 4/ 1/66 — 422,000 tons
In the period 4/1/66 - 9/31/68 — 560,000 tons

and

that during the same periods the plaintiff could have sold at some profit—

Period 4/1/64 - 4/ 1/66 — 360,000 tons
Period 4/1/66 - 9/31/68 — 440,000 tons

The loss of profit on the tonnage which could have been sold—

First period — 360,000 tons
Second period — 440,000 tons

is an allowable item of damage under the "reasonable certainty" requirement, if the defendant be liable as a matter of law. The profit loss was foreseeable. The loss for the first period was proximately caused by the coercion of the April strike and the penalty characteristics of the 80-cent clause. There was no relation between the

1966 strike and the 80-cent clause; however, the contract (1966) itself, insofar as the 80-cent provision is concerned, is and was the coercion which prevented plaintiff from purchasing coal from non-signatories.

59. The plaintiff, in its damage claim, makes certain contentions which the Court rejects as speculative. Among them are these:

a) That the plaintiff's sales would have increased in 1964-68 according to industry increase percentages.

b) That the coal involved would have been sold to "high realization" rather than "low realization" customers—this based on dock routings for the four months preceding the period.

c) That the plaintiff was rushed for business in addition to that dealt with in the "order shortage" exhibit.

d) That the cancellation (or reducing to a one-year) of a long-term contract with the Cincinnati Gas & Electric Company was due to the price rise feature connected with the 80-cent clause, rather than a ceiling imposed in the long-term contract escallation clause involving comparison with another supplier. Available witnesses could have set that speculation to rest (i.e., employees of the customer, C.G. & E.). They were not produced by the party having the burden—with the usual inference.

We have considered each of these and, obedient to Riverside v. UMW, 410 F.2d 267, 70 LRRM 3214 (6th, 1969) reject each—the evidence in respect of each leaves us to guess or speculate. We are not "reasonably certain" in any of the above respects.

60. In the last preconstraint year, the plaintiff produced and/or purchased on the one hand, and sold on the other hand approximately 1,125,000 tons. The oper-

ating profit (before taxes and nonoperating expenses) realized from the integrated Davison and subsidiaries operation was approximately $95,000.00. On a per ton basis this amounts to a gross operating profit of approximately 8 cents a ton. True it be that the operations in the three years, 1963-64-65, fluctuated rather violently up and down but "once the fact of damage has been shown, uncertainty as to their amount will not foreclose recovery." Flame Coal v. UMW, 303 F.2d 39, 50 LRRM 2272 (6th, 1962). On this basis we accept the 1963 figure as the best proof, closest in time, available. On this basis, if the plaintiff be substantively entitled under the law to recover damage for loss of profit (i.e., if the unfair practice be established) the plaintiff is entitled to recover for loss of profit as follows:

Period 4/1/64 - 4/ 1/66 — $28,800.00
Period 4/1/66 - 9/31/68 — $35,200.00

61. The plaintiff's profit-loss damage claims, totalling $2,587,315.00 are rejected except to the extent dealt with above. The claims are based on plaintiff's exhibits 52 and 53 and the testimony relative thereto. The claim broadly amounts to an assertion that an operation which in the sole preconstraint year (1963) in evidence made $95,000.00 (before taxes etc.) would have made a profit (before taxes etc.) of in excess of $500,000.00 a year over the approximate 4½-years of constraint. This was not a new company—it was long existent. We have mentioned some assumptions leading to the assertion—one more should be mentioned: The plaintiff's loss of profit claim is based on, among other assumptions, the assumption that over 2,000,000 tons of coal, involving dozens of entities and some eleven millions of dollars could and would have involved no increase in administrative expense. That is simply too speculative.

Conclusions of Law

1. The plaintiffs, Riverton and Davison, are employers within the meaning of 29 U.S.C. § 152 and 29 U.S.C. § 187. They are engaged in "commerce" and a business "affecting commerce" within the meaning of the Labor Management Relations Act. Davison is an "affiliate" of Riverton and as such is includible within the meaning of the word "whoever" in 29 U.S.C. § 187. Gilchrist v. United Mine Workers, 290 F.2d 36, 48 LRRM 2083 (6th Cir. 1961); and Wells v. Union, 303 F.2d 73, 50 LRRM 2198 (6th Cir. 1962) are ample authority for this. If employees of a contracting party and a related partnership having a contract with the related employer are "whoevers," then certainly a legal entity described in a contract between a union and a company for the purpose of fixing additional liability upon the employer-contracting party (dependent upon the activity of the related company) is party enough to assert in a proper case damage arising from or connected with the contract and 29 U.S.C. § 187 and Section (b) of 29 U.S.C. § 158.

Throughout the findings of fact, this Court has intentionally referred to the plaintiffs in the singular. While the two plaintiff entities are separate and separable for a great many legal purposes, for purposes of this case they constitute actually only one "whoever" and one person.

2. The defendant is a "labor organization" within the meanings of Section 2 and 5 of the Labor Management Relations Act.

3. The $64 question in this case is whether the 80-cent and coal lands clauses of the 1964-66 contracts violate 29 U.S.C. 158(e) of the Act. The books are full of cases either directly or indirectly attacking the problem.

References to some of them and a little history by reference to others of them and the simple adoption of these cases and their incorporation herein by reference will substantially shorten these conclusions. All the arguments pro and con are in the books and this Court could provide no new answer—every question has been answered both ways in one or the other of the authorities. The significant point to bear in mind constantly is that the 80-cent clause did not just appear out of a vacuum. It has been repeatedly described as a substitute for the Protecive Work Clause and in fact the many litigants have agreed rather consistently that if the first clause be valid, the second one is also. The District Circuit put it this way:

> "Since the 80-cent clause is by everyone's admission and our characterization a substitute for the union standards clause, it is the Board's responsibility to carefully consider whether, in fact, it functions as one. If it does * * * the 80-cent * * * clause would seem to be a valid provision."

The background of the Protective Work Clause, which came forth in 1958, has been recited so many times by now in one or another of the courts in this circuit that it is probably a fair subject for judicial notice. It is described in considerable detail in Lewis v. Pennington, 257 F.Supp. 815, 62 LRRM 2604 (E.D. Tenn., 1966) beginning at page 821 and ending at page 825. The description fairly summarizes the evidence in this case dealing with the subject. In that case, Judge Taylor referred to the 80-cent clause as "devoid of secondary pressures and does not fall within the targets at which 8(e) was aimed." The decision in that case was affirmed on grounds not of interest here [400 F.2d 806, 69 LRRM 2280 (1968)] and in the course of the opinion, Judge Peck had occasion to

briefly refer to the Protective Work Clause (beginning on page 814).

In Ramsey v. United Mine Workers, 265 F.Supp. 388, 64 LRRM 2493 (E.D. Tenn.) Judge Wilson likewise described the history of the collective bargaining in the bituminous coal industry from 1890 through 1958. In the course of that description, Judge Wilson remarked at page 408:

> "It does appear that following the negotiations of the National Bituminous Coal Wage Agreement of 1950, the Union had in fact, if not in theory, nothing but the national contract and its amendments to offer to any other bargaining unit."

In 1962 the General Counsel of the NLRB charged the Union and its officers and the multi-employer signatories to the 1958 agreement with unfair labor practices within the meaning of 8(e) and Section 2 (6 and 7) of the Act. The Protective Work Clause was the basis of the charge. The General Counsel either then or thereafter held and has continued to hold that there is nothing secondary at all about the "application to coal lands" clause. With that this Court certainly agrees. In that proceeding and in August, 1963, the Board, with one member of a panel of three dissenting, concluded that the clause was secondary and did violate 8(e). R. O. Lewis, et al., 144 NLRB 228, 54 LRRM 1037. Subsequently, and after the decision and order in that case, the Union filed a motion stating that in April, 1964, they had negotiated a substitute for the PWC—that substitute being the .80-cent clause—contending that the substitute did not violate 8(e) and requesting the Board to so determine and thereupon conclude that the Union was in compliance with the Board's original order. The plaintiff in this case intervened in that proceeding. In that proceeding the Board

held that the 80-cent clause, too, violated 8(e), again with one member dissenting. See R. O. Lewis, 148 NLRB 249, 56 LRRM 1471, 57 LRRM 1146, decided August, 1964.

Thereafter an appeal was taken in this proceeding to the District of Columbia Court of Appeals. That Court, in August of 1965, characterizing the PWC as a union standards clause, remanded the case to the NLRB for consideration of the effect of several intervening decisions by that Circuit. The Court indicated that a determinative question which should be decided was this:

> In this industry what was the work unit—the employees of each mine operator on the one hand, or on the other hand all employees covered by union contract?

This case is reported as Lewis v. N.L.R.B., 350 F.2d 801, 59 LRRM 2946. In its language, the N.L.R.B. accepted the remand and in turn remanded PWC to a trial examiner. Meanwhile the chief executive officer of the plaintiff in this case—or, for purposes of this case, one might just as well say the plaintiff in this case—had filed an unfair labor practice charge based on the 80-cent clause. The trial examiner in March of 1966 concluded, as had the Board previously, that the 80-cent clause violated 8(e). His decision was affirmed by the Board on the ground that the "claimed protection of work extends beyond the bargaining units." The Board's decision is reported in 165 NLRB 467, 65 LRRM 1324. This decision of the Board was announced on June 16, 1967, and we refer to the proceeding as the plaintiff charging proceeding. Less than two weeks later, and on June 20, 1967, the trial examiner to whom the Board remanded the matter which the Circuit had remanded to it—PWC—

announced his decision in case titled 5-CE-6. His conclusion was that the protective wage clause "bears more than an incidental relationship to protecting the work standards set in the basic agreement and that it operates to encourage, but not to compel, the unorganized segment of the industry to become signatory to the agreement." See W. A. Boyle, et al., 179 NLRB No. 80, 72 LRRM 1426, 1428. Thereafter, in the plaintiff charging case, an appeal was taken to the District Circuit. In July, 1968, the Circuit remanded that proceeding, too, back to the NLRB, with directions that the Board make a full inquiry into the intent of the parties making the 80-cent clause agreement and a full inquiry into its validity as a "surrogate" union standards clause. Union v. NLRB, 399 F.2d 977, 68 LRRM 2664.

Next, and almost finally, in November of 1969, the Board, with one member dissenting, affirmed the conclusions of the remand trial examiner in PWC [72 LRRM 1426]. The Board concluded that PWC was primary in that it was an attempt to "protecting unit work through the medium of a union standards clause." W. A. Boyle, et al., *supra*, p. 1429. And last, in July of this year it came to the attention of the District of Columbia Circuit Court of Appeals that almost two years had gone by since its remand of the 80-cent case—the plaintiff charging case. The Circuit Court recalled its mandate and remanded to the NLRB with directions "to complete its proceedings on remand and to render a decision by 12/1/70."

This history is fairly indicative of the closeness of the question involved here and, as we have said, all the pros and cons may be found in the referenced reports.[1]

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[1]In Pennington, 381 U.S. 676, at 708, 59 LRRM 2369, 2385, Mr. Justice Goldberg, in a separate opinion, in a footnote, and having in mind as the footnote indicates PWC, asided (since that was an anti-trust case), that PWC "bristles with potential unfair labor practices."

Before the Labor Board and the District of Columbia Circuit and in the trial of this case, the various parties have directed considerable evidence and briefing to such questions as: What is the appropriate "work unit?" Does work unit mean the same as bargaining unit? Should there be one rule or conclusion governing substitute coal and another rule or conclusion governing supplemental coal? Who has the burden of proof in developing whether or not all substitute coal, of whatever grade, could be produced by the employer members involved in whatever was the proper bargaining unit or work unit? While we do not underestimate the importance of such questions in different contexts, we do not think a decision upon them is necessary to this case. If this Court underestimates the importance of the questions in this case, it is of no loss to any reviewing or other court—all the pros and cons that can be said have been said in the citations above given. We could add none to an eight-year history which has still left up in the air a final decision on any one of them—a rather sad tribute to our administrative and judicial system.

One of the questions of law in this case before this Court was whether the history of the union negotiations going back dozens of years (multiple and singular) which led to PWC and/or the 80-cent clause is relevant. The conclusion of this Court is in the affirmative. It is for this reason: Any work preservation clause or any union standards clause will of necessity limit the right of an employer to deal with other employers or to handle their products. It is difficult to imagine such a clause which would not run afoul of 8(e). While Fiberboard v. NLRB, 379 U.S. 203, 57 LRRM 2609 (1964), did not involve 8(e), since it arose in 1959, we look to it for an example. Fiberboard is definite authority for the proposition that

a contractual limitation on an employer prohibiting him from subcontracting work previously done himself is primary. Obviously the clause prevented the employer, not from handling the products of some employers or dealing with some employers, but from refraining from handling in the particular field involved the products of all employers or dealing in the particular field with all employers. It had 100% secondary effect. Since 8(e) was added in 1959, the Supreme Court has had occasion to deal with 8(e) in the areas involved in this case in Woodworkers v. NLRB, 386 U.S. 612, 64 LRRM 2369 (1967). If we read that case correctly it stands for this: The five majority held that even though the clause involved runs literally afoul of 8(e), inquiry should be made into the real purpose of the clause—secondary or primary. If we read the four minority correctly, their holding was that whatever the purpose was, if a product boycott is a result, work preservation is no excuse. Before taking the liberty of paraphrasing part of the majority opinion in the context of this case, it should perhaps be reiterated that the entire history of the union negotiations with coal mine operators and the specific history of union negotiations with the plaintiff is relevant and competent in respect of the question of union purpose; that would be obviously so in respect of the plaintiff and under the facts in this case, as outlined above, and as contained in the opinions of the district courts in this Circuit above, no one can separate union intent or purpose in the multiple in 1964 or 1966 or 1958 from union intent or purpose in the singular.

And now to the paraphrasing—the clause which started Woodworkers in effect prohibited the employer from buying fitted doors. The clause with which we deal prohibited an employer from buying products produced

under less favorable labor conditions than were applicable to the employer. Union carpenters in Philadelphia had historically handled unfitted doors. Union miners had historically been confronted with the problem of subcontracting. Their problem had been historically not only subcontracting but in a sense the same problem the Internal Revenue Service has had for many years in dealing with spin-offs or split-ups—the problem being: who is really who. This is as good a place as any to note that 8(e) fundamentally deals with preventing one independent person from dealing with another independent person. "Any other employer" in 8(e) does not include an alter ego of the contracting employer and a change of name or activation of a corporation is no more sanctimonious in this field than in any other legal field. In the nine months' period prior to April 1, 1964, the plaintiff purchased—subcontracted, if one would use a more accurate word in this field—approximately 410,000 tons. In the entire year of 1963, approximately 617,000 tons were produced by the plaintiff and its subsidiaries. If we would extend the nine months' period proportionately, it would be concluded that the plaintiff during 1963 purchased or subcontracted for roughly about half the coal it dealt in and produced about half of it—43% to 57% is about accurate. In 1964, the production by the plaintiff amounted to almost 650,000 tons and, in 1965, the plaintiff's own production, 832,000 tons, was approximately 75% of the aggregate of coal produced and purchased in 1963. While the plaintiff pleads financial inability in 1963, there is no evidence in this record of any difficulty in plaintiff's financial ability 1963 vis-a-vis 1965. To get back to the nine months' period antedating the 80-cent clause, of the 409,000 tons purchased by the plaintiff in that period, two-thirds was purchased from

operators operating on land owned or leased by the plaintiff and about one-third was purchased from independent—to return to the statute: "any other employer." By everyone's admission, PWC was not enforced, so that was no problem to any employer; by everyone's admission, the 80-cent clause posed real problems to employers. The factual development after the effective date of the 80-cent clause is considerable indication of what could have been and was a real concern of the defendant union vis-a-vis the plaintiff at the time the 80-cent clause was "negotiated." And this record bears out that the same condition existed generally in the industry.

To return again to the paraphrasing: The Court majority indicated that the target conclusion of the Seventh Circuit was that "primary or secondary objective was irrelevant to a question whether a 'will not handle' agreement violates 8(e)." The Court said:

> "It is a 'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.'"

It said:

> "* * * congressional action to deal with such conduct has stopped short of proscribing identical activity having the object of pressuring the employer for agreements regulating relations between him and his own employees. * * * Congress meant * * * to prohibit only 'secondary' objectives * * * its [8(e)] core concept: union pressure directed at a neutral employer the object of which was to induce or coerce him to cease doing business with an employer with whom the union was engaged in a labor dispute. * * * however severe the impact of primary activity on neutral employers, it was not thereby transformed into activity with a secondary objective.

"The literal terms of § 8(b)(4)(A) also were not applied in * * * cases in which the union's pressure was aimed toward employers performing the work of the primary employer's striking employees. The rationale, again, was the inapplicability of the provision's central theme, the protection of neutrals against secondary pressure, where the secondary employer against whom the union's pressure is directed has entangled himself in the vortex of the primary dispute. '[T]he union was not extending its activity to a front remote from the immediate dispute but one intimately and indeed inextricably united to it.' * * *.

"* * * § 8(b)(4)(A) * * * barred as a secondary boycott union activity directed against neutral employer, including the immediate employer when in fact the activity directed against him was carried on for its effect elsewhere. * * * [Nothing in 8(b)(4)(B) makes unlawful, where not otherwise unlawful, any primary activity.] * * * Although the language of § 8(e) is sweeping it * * * does not prohibit agreements made and maintained for [the] purpose * * * to preserve for [employees] work traditionally done by them * * *".

"* * * primary work preservation agreements were not to be within the ban of § 8(e). * * * Congress, in enacting § 8(e), had no thought of prohibiting agreements directed to work preservation. * * * 'the termination of employment which * * * necessarily results from the contracting out of work performed by members of the established bargaining unit,' is 'a problem of vital concern' * * * 'Experience illustrates that contracting out in one form or another has been brought, widely and successfully, within the collective bargaining framework'. * * * these provisions caution against reading statutory prohibitions as embracing employee activities to pressure their own employers into improving the employees' wages, hours, and working conditions."

The nub of the decision is at pages 644 and following of the majority opinion.

> "The determination whether the 'will not handle' sentence of Rule 17 and its enforcement violated § 8(e) and § 8(b)(4)(B) cannot be made without an inquiry into whether, under all the surrounding circumstances,
>
> [Footnote: As a general proposition, such circumstances might include the remoteness of the threat of displacement by the banned product or services, the history of labor relations between the union and the employers who would be boycotted, and the economic personality of the industry. See Comment, 62 Mich. L. Rev. 1176, 1185 et seq. (1964).]
>
> the Union's objective was preservation of work for * * * employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere. Were the latter the case, * * * the boycotting employer * * * would be a neutral bystander, and the agreement or boycott would, within the intent of Congress, become secondary. There need not be an actual dispute with the boycotted employer, here the door manufacturer, for the activity to fall within this category, so long as the tactical object of the agreement and its maintenance is that employer, or benefits to other than the boycotting employees or other employees of the primary employer thus making the agreement or boycott secondary in its aim. The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees. This will not always be a simple test to apply. But 'however difficult the drawing of lines more nice than obvious, the statute compels the task.' * * *
>
> "That the 'will not handle' provision was not an

unfair labor practice in these cases is clear. The finding of the Trial Examiner, adopted by the Board, was that the objective of the sentence was preservation of work traditionally performed by the jobsite carpenters. This finding is supported by substantial evidence, and therefore the Union's making of the 'will not handle' agreement was not a violation of § 8(e).

"Similarly, the Union's maintenance of the provision was not a violation of § 8(b)(4)(B). The Union refused to hang prefabricated doors whether or not they bore a union label, and even refused to install prefabricated doors manufactured off the jobsite by members of the Union. This and other substantial evidence supported the finding that the conduct of the Union on the * * * jobsite related solely to preservation of the traditional tasks of the jobsite carpenters."

There is one feature of the 80-cent clause which makes the "task" of "drawing lines more nice than obvious" particularly difficult. By everyone's concession, a clause in a union-employer contract which would prohibit the employer from doing business with any non-union employer would be an unfair labor practice and illegal. By everyone's admission also, no employer but a union signatory employer could, legally or otherwise, make contributions to the United Mine Workers Welfare Fund—so we were told partially by stipulation in this case and partially orally during the trial. From that it would appear that the inescapable conclusion is that the 80-cent clause prohibited an employer from doing business with a non-union employer. Two things in this record militate against that. The 80-cent clause is not an actual prohibition—it may or may not be a penalty amounting to a prohibition. It may or may not have been the negotiated estimate of a price that would assure the employee that

the employer would not substitute, but would only supplement. This record does indicate that there was negotiation between $1.00 and 80 cents at the multiemployer levels, but we are told nothing on this record of the factors involved in that negotiation. In the absence of a record of what happened, a court may only conjecture. If the 80-cent amount was negotiated out as the reasonable price of effective deterrents to substituting, it would not be invalid. The contract therefore being capable of several possible constructions in the absence of light of the actual negotiations, a court should construe it in the light which would sustain it. We so do. See Lewis v. Pennington, 400 F.2d 806 (6th Cir. 1968) at 814-15, 69 LRRM 2280; Ramsey v. UMW, 265 F.Supp. 388, 64 LRRM 2498 (E.D. Tenn. 1967). In the latter case, at page 412, Judge Wilson, dealing with a part of this same contract, observed—

> "The law is well settled that where two constructions of a written contract are reasonably possible, preference must be given to that one which does not result in a violation of law."

Another factor leading to this conclusion is, of course, that by everyone's admission the 80-cent clause is a substitute for PWC. PWC has been defined both by the NLRB and the District of Columbia Circuit as a "union standards clause." While PWC did contain a provision that one of the factors to be considered before the joint committee was "payments to the United Mine Workers Fund," it did not provide that the presence or absence of such was in and of itself determinative of "like standards." If anything, it was merely a factor. This Court so construes it, based on the Sixth Circuit Pennington case, supra. In the task of drawing fine lines, it should be no surprise to conclude that an admitted substitute is the

equivalent of what it was substituted for, particularly when the substitute was obviously enforced by an NLRB hearing in a decision which has subsequently been reversed by the same NLRB.

Conclusorily, it is the conclusion of law of this Court that neither PWC nor the 80-cent clause ran afoul of 8(e). The primary, and clearly primary, purpose of each of them was to tackle in a successful way a legitimate problem of subcontracting and work preservation which has existed for decades and had been attached for decades in unsuccessful contractual methods. It is difficult to separate secondary results from secondary purposes—using secondary in its common sense and not in its Labor Management sense. A secondary effect of each of these clauses was the protection of the Welfare Fund—clearly a legitimate primary (in a labor sense) target. A secondary effect of each of these clauses was the unionization of some non-union employers. It was foreseeable and in that sense was a purpose at the time the clauses were negotiated. However, using the terms in the Labor Management sense, the secondary purpose was an incident to the primary purpose, which was work preservation. It is obvious on the record that the unionization effect was a matter of choice, even to neutral employers. It was not a matter of compulsion. Of the neutral employers with which the plaintiff dealt in early 1964, 15 unionized and 22 did not. On this record, one could only conclude that the 80-cent clause did exactly what it was designed to do—it resulted in the employer producing more with his own employees than he ever had before by substantial percentages. Cf. Union v. NLRB, F.2d, 74 LRRM 2851 (C.A. D.C. 23342, July 29, 1970.)

4. The defendant in 1964 induced and encouraged in-

dividuals employed by the plaintiff to engage in a strike and a refusal to perform services for Riverton in the course of their employment and also threatened, coerced and restrained Riverton, as those words are used in 8(b)(4)(A) and (B). [UMW v. Osborne, 279 F.2d 716, 46 LRRM 2380, cert. den. 364 U.S. 881, 47 LRRM 2065.] An object, and by far the primary object, of such conduct was to force and require Riverton to enter into the 1964 agreement containing the 80-cent clause and that clause was one of the major additions or changes from the 1958 contract; in other words, the strikeforce coercion threat was directly and primarily related to the 80-cent clause. A proximate result of the 80-cent clause to Riverton was to force it to cease dealing in the products of other producers of coal, i.e., producers who were not unionized. Another proximate result was the forcing of some then non-union producers to unionize and in that sense a proximate result of the clause was bargaining by the Union as the representative of employees it did not represent as a matter of certification. While these were proximate results and foreseeable effects, none of them, nor the collection of them, constituted the primary purpose for exacting the 80-cent clause bargain. That was to prevent subcontracting, preserve Riverton's employees' work, maintain union standards in the production of coal which could just as well have been produced by Riverton and protect the integrity of the Welfare Fund.

In concluding that the 1964 strike was union-authorized, we have applied Coronado as modified by 29 U.S.C. § 185(e) [see Garmeada, 122 F.Supp. 512 (E.D. Ky. 1954) at 517, 34 LRRM 2567] and have applied that subsection, i.e., 29 U.S.C. § 185(e). We have not held the plaintiff to proof of specific authority; in other words, the authorization of the Field Rep. McCoy to represent

the District on the spot included an authorization to call a strike, which he did as effectively as if he had used that language when he gave the signal, "I told them that they did not have one"—meaning a contract. The requirement has been by a preponderance and the plaintiff has shown by a preponderance that the defendant, through its District 17, authorized the 1964 strike. This Court has given no weight in this conclusion or finding to the fact that the Union did nothing to punish or discipline the errant Local in 1964, despite the parent-child relationship. So much of Coronado remains in view of the explanation in Gibbs, supra, "There can be no rigid requirement that a union disavow."

5. As a result of the conduct of the defendant in 1964, the plaintiff terminated its agreement with Ford Coal. It would be speculative to conjecture on whether that contract would have been renewed at the end of its two-year period.

6. With respect to the 1966 strike, there is no evidence in this case based on which this Court could say that the plaintiff has maintained the burden of proving by a preponderance that District 17, or the defendant, either authorized or ratified the 1966 strike at Riverton. At or about that time unauthorized and sporadic strikes were going on all through the Union's jurisdiction, prompted by the failure of the Union and the BCOA to come to some agreement. The situation was entirely different from 1964. There is certainly no connection whatever between the 80-cent clause in either the 1964 or 1966 contract and the 1966 strike. If the 80-cent clause did violate 8(e) and it would be so held in an upper court, there is a nice question of law and fact in this case related to damages and specifically relating to the 1966 contract

—again bearing in mind that this is not a 301 case. The applicable law, of course, is stated in Ritchie v. UMW, 410 F.Supp. 827, 71 LRRM 2267 (6th Cir. 1969) and Teamsters v. Morton, 377 U.S. 252, 56 LRRM 2225 (1964). Only damages which directly and proximately result from an unfair labor practice would be recoverable.

To concentrate for a minute, the problem relates to loss of profits simply and relates to this: Assuming an unfair labor practice resulting in a contractual limitation causes loss of profit to the employer, at what point in time thereafter does the profit loss pass from the proximate and reasonably certain to the speculative. About four years elapsed between April, 1964, and the time the parties by agreement forced the absolute ending period as September, 1968. We have been cited to no authority on this problem; nor do we find any. While it is this Court's conclusion that the four-year period would not be too long and that the plaintiff, if it may recover at all, should recover loss of profit during the entire period; and while it is this Court's conclusion that the making of an interim contract in 1966 did not toll the right or liability, nonetheless, as the foregoing indicates, this Court has made findings of fact in respect of profit loss during what might be called the first period from April of 1964 to 1966 and the second period April, 1966, to September, 1968, separately, so that if there be a reversal on liability, the facts which raise the question for decision will be before a reviewing court.

7. The general rules applicable to damages in this type of case have been so recently stated by the Sixth Circuit in Riverside v. UMW, 410 F.2d 267, 70 LRRM 3214 (1969) and Ritchie v. UMW, 410 F.2d 827, 71 LRRM 2267 (1969) that we need not repeat them in any

detail. First, the plaintiff has the burden of proof by a preponderance; second, only damages proximately resulting from an unfair labor practice may be recovered; third, in the profit area, the plaintiff has the burden of proving loss of profit by evidence showing the loss to be reasonably certain—a fact finder may not engage in speculation or guesswork.

8. Applying those principles to the various items of damage claimed, if the issue of liability should have been determined in favor of the plaintiff and against the defendant, the plaintiiff should recover:

a) The $15,000.00 paid to Ford Coal and the $1,793.46 in fees and expenses related to the settlement, and interest thereon from the dates of payment. The Ford Coal contract breach was the direct result of the 80-cent clause.

b) $13,095.57 for continuing fixed costs and expenses to the plaintiff resulting from the April 10 through April 15, 1964, strike—together with interest from April 15, 1964, since the amount is quite readily determinable.

c) $20,294.97, being the costs and expenses, including attorney's fees, incurred by the plaintiff in connection with the alleged unfair labor practice. This should be without interest—within the difficulty of determination rule.

We are aware that punitive damages are not recoverable in an unfair labor practice case, and we are aware that attorney's fees are generally associated with punitive damages. However, it has been established that at least some costs (initial filing, for instance) are recoverable in a damage action based on an unfair labor practice. That being so, we see no reason to stop there in a situation in which (a) the plaintiff not only had a right of

intervention which resulted in these costs, but (b) as this record establishes, was invited by the governmental authority involved to intervene.

d) This is not a 301 case. Even assuming that Lewis v. Benedict, 259 F.2d 346, 43 LRRM 2237 (6th Cir. 1958) —affirmed by a divided court, 361 U.S. 459, 45 LRRM 2719, read in connection with Union v. Lucas Flour, 369 U.S. 95, 49 LRRM 2717 (1962), would dictate the conclusion that the 1964 Agreement of these parties was the equivalent of a "no strike" clause, nonetheless, the 1966 strike was neither authorized nor ratified by the defendant. The Union members who struck were not per se Union agents. The plaintiff must prove more than merely show, as it did, that all the members of the local struck. The plaintiff did prove the amount of damage resulting to it from the 1966 strike, to-wit, $36,128.50.

e) The loss of profit proximately resulting from the 80-cent clause for the first period shown by the evidence which the plaintiff certainly did suffer was $28,800.00, during the second period it was $35,200.00. Neither of these would bear interest under familiar rules.

Conclusion

This is not a judgment. During the ten-day period after the filing of these Findings and Conclusions the parties are invited to call the attention of this Court to any obvious errors of a mathematical (exceeding 5%) or copying, or mechanical nature. At any time after the ten-day period the parties may present a judgment based hereon which will, of course, be a judgment dismissing the complaint at plaintiff's costs.

Filed October 26, 1970

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

RIVERTON COAL COMPANY, a
West Virginia corporation,
and DAVISON FUEL AND DOCK
COMPANY, an Ohio corporation,
Plaintiffs,

v. Civil Action No. 5805

UNITED MINE WORKERS OF AMERICA,
Defendant.

and

RIVERTON COAL COMPANY, a
West Virginia corporation,
and DAVISON FUEL AND DOCK
COMPANY, an Ohio corporation,
Plaintiffs,

v. Civil Action No. 6730

UNITED MINE WORKERS OF AMERICA,
Defendants.

Final Judgment

The above-entitled actions came on to be heard by the Court, sitting without a jury, and the Court, having considered of the evidence and the briefs and arguments of counsel and, for the reasons stated in its Findings of Fact and Conclusions of Law heretofore filed on October 8, 1970 and amended on October 26, 1970 and made a part of the record herein, is of the opinion that plantiffs,

Riverton Coal Company and Davison Fuel and Do
Company, and each of them, have failed to establi
their alleged causes of action against the United Mi
Workers of America and its District 17 under Secti
303 of the Labor Management Relations Act, 1947,
amended [called "Act"] (29 USCA 187), and Secti
8(b)(4)(i)(ii)(A) and (B) [29 USCA 158(b)(4)(
(ii)(A)(B)] and Section 8(e) [29 USCA 158(e)],
of said Act.

It is accordingly

ORDERED, ADJUDGED and DECREED that t
causes of action alleged and asserted in each of sa
causes of action by Riverton Coal Company and Davis
Fuel and Dock Company, and each of them, against t
United Mine Workers of America and its District 17 und
Section 303 of said Act (29 USCA 187), and Secti
8(b)(4)(i)(ii)(A) and (B) [29 USCA 158(b)(4)(i)(
(A) and (B)] and Section 8(e) [29 USCA 158(e)],
of said Act by plaintiffs herein, and each of them, agai
United Mine Workers of America and its District 17
and hereby are dismissed with prejudice, and plainti
and each of them, shall take nothing by their respect
actions.

It is further ORDERED, ADJUDGED and DECRE
that the costs of said actions shall be, and are, tax
against plaintiffs, and each of them, and in favor
defendant United Mine Workers of America.

Enter this 26th day of October, 1970.

s/ TIMOTHY S. HOGAN
District Judge

Have seen:

s/ J. MACK SWIGERT
Attorney for Plaintiffs

s/ ROBERT I. DOGGETT
Attorney for Defendant

APPENDIX B

Decided and Filed January 21, 1972.

Nos. 71-1021 & 71-1022

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RIVERTON COAL COMPANY and DAVISON FUEL AND DOCK COMPANY, *Plaintiffs-Appellants and Plaintiffs-Appellees,* v. UNITED MINE WORKERS OF AMERICA, *Defendant-Appellee and Defendant-Appellant.*	APPEAL from United States District Court for the Southern District of Ohio, Western Division.

Before PHILLIPS, Chief Judge, and WEICK and CELEBREZZE, Circuit Judges.

WEICK, Circuit Judge. Riverton Coal Company (Riverton) and Davison Fuel and Dock Company (Davison) have appealed from a judgment of the District Court dismissing their joint action against United Mine Workers of America (UMW) for recovery of damages under Section 303 of the Labor Management Relations Act of 1947, as amended (29 U.S.C. § 187), because of violations of Section 8(b)(4) and Section 8(e) of the Act.

The case was tried to the Court without a jury. Findings of fact and conclusions of law were adopted, in which the Court held that UMW had not violated the Act, and dismissed the complaint. Because of the difficult nature of the case and the closeness of the questions involved, the Court made findings of fact as to damages against UMW in the amount of $150,312.50, plus interest,

for use of the Appellate Court so that the case could be finally disposed of on appeal without remand for retrial on the issue of damages, in the event the judgment was reversed on the issue of liability.

UMW filed a cross-appeal complaining of errors in the findings of fact and conclusions of law adopted by the District Court.

Both Riverton and Davison are corporations; the former is organized under the laws of West Virginia, and the latter under Ohio laws. Riverton was engaged in the business of coal mining and loading river barges on the Kanawha River at Crown Hill and Marmet, West Virginia. Davison had offices at North Bend, Ohio, and was engaged in the business of selling coal. Davison was exclusive sales agent for all of Riverton's mined and purchased coal, receiving a commission ranging from six to eight per cent of the selling price. Riverton was a wholly owned subsidiary of Davison, which kept Riverton's books and records. The capital stock of Davison was closely held and a majority of the stock was owned by the Davison family.

Riverton entered into a collective bargaining agreement with UMW, effective December 1, 1958, which was not subject to termination prior to November 30, 1959, but thereafter either party could terminate the agreement upon thirty days' written notice to the other.

UMW is an unincorporated labor organization with headquarters in Washington D.C. and a district office in Charleston, West Virginia. It was the exclusive bargaining representative of Riverton's employees, who worked in the coal mines in West Virginia. The employees belonged to Local 1209 of UMW.

It was customary for Riverton to purchase coal to supplement its production to fill orders and to meet market requirements. It operated its own mines to full capacity but could not mine enough coal to meet all of its sales requirements because of limited financial resources and lack of necessary mining equipment.

In 1962-63 Davison sold 2,170,000 tons of coal, of which 44½% was coal which had been purchased by Riverton and Davison from other coal mine operators, some of whom were signatory to UMW agreements and others of whom were not. The base price of coal purchased was the same from all operators, namely, four dollars per ton. Also, the quality of the coal was the same. During nine months prior to April, 1964, 78% of the coal purchased by Riverton was purchased from nonsignatory mines, and 22% was purchased from signatory mines.

Some of the suppliers of coal operated on lands in which Riverton and Davison had no interest; others operated on lands owned by Davison and leased to them by Riverton.

The District Court found that in the fall of 1963 UMW, through District 17, called to plaintiffs' attention "the fact that it was doing business with nonunion operators operating under leases from plaintiff on lands controlled by plaintiff and the purpose was to secure plaintiff's 'help' in organizing these operators in exchange for a Union 'consent' to a business enterprise plaintiff was interested in." Riverton officials did not commit themselves.

In November, 1963, District 17 again contacted Riverton to ascertain what it was doing to force nonsignatory operators to become signatories to a UMW contract.

Riverton asked for a list of such operators, which was supplied. It was not claimed that the employees of the nonsignatory operators desired UMW to act as their bargaining representative. Riverton did nothing to induce any of the nonsignatory operators to become signatories.

I

THE 1964 STRIKE

The District Court found that while the 1958 Collective Bargaining Agreement was in full force and effect, UMW, in violation of the terms and provisions thereof, authorized a work stoppage at Riverton's mines commencing on April 10, 1964, which continued until the evening of April 15, 1964. The strike was also a violation of Section 8(d) of the Act.

The Court found that an object of the April 1964 strike was to force or require Riverton to enter into the proposed 1964-form of printed amendment to the National Bituminous Coal Wage Agreement of 1950. The Court further found:

> "Another object of the said strike was to force or require Riverton and Davison to cease using, selling, handling, transporting or otherwise dealing in the products of coal producers who were not signatories to an agreement with the defendant Union and to cease doing business with such producers. Another effect of the said strike was to encourage coal producers selling coal to Riverton or Davison to recognize or bargain with the defendant Union as the representative of the employees of such producers even though the defendant Union had not been certified as the representative of such employees under the provisions of Section 9 of the Act. After Riverton signed the 80-cent clause, and as a result

thereof, some fifteen nonunion producers from which Riverton had been buying supplemental coal became signatories to the UMW agreement. Some twenty-two did not—so the effect was not to 'force' or 'compel' but to encourage."

In order to settle the strike and resume operation of its mines, Riverton was forced to sign the National Bituminous Coal Wage Agreement of 1950, as amended, effective April 2, 1964, which it did under protest on April 15, 1964, and UMW then withdrew its pickets and permitted the mines to resume operations.

The 1964 amendment contained the so-called "80-cent penalty clause" and the "coal lands clause", which Riverton objected to as being illegal.[1] The Protective Wage Clause was dropped from the agreement in that year. Prior to the 1964 Amendment signatories were required to pay into the Welfare Fund forty cents per ton of coal

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[1]The pertinent provisions of the so-called "80-cent penalty clause" are as follows:

"United Mine Workers of America Welfare and Retirement Fund of 1950

". . . During the life of this agreement there shall be paid into such Fund by each Operator signatory hereto the sum of forty cents (40¢) per ton of two thousand (2,000) pounds on each ton of bituminous coal produced by such Operator for use or for sale. On all bituminous coal produced or acquired by any signatory Operator for use or for sale, (i.e., all bituminous coal other than that produced by such signatory Operator) there shall, during the life of this Agreement, be paid into such Fund by each such Operator signatory hereto or by any subsidiary or affiliate of such Operator signatory hereto the sum of eighty cents (80¢) per ton of two thousand (2,000) pounds on each ton of such bituminous coal so procured or acquired on which the aforesaid sum of forty cents (40¢) per ton had not been paid into said Fund prior to such procurement or acquisition."

In relevant part, the "coal lands clause" read:

"Application of Contract to Coal Lands

"As part of the consideration for this agreement, the Operators signatory hereto agree that this Agreement covers the operation of all the coal lands, coal producing and coal preparation facilities owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this Agreement, or acquired during its terms which may hereafter (during the term of this Agreement) be put into production or use . . . ."

produced by them. The purpose of the amendment was to require signatories who procured or purchased from non-signatories soft coal for sale or use, to pay into the Welfare Fund eighty cents per ton of coal so purchased or procured.

In *South-East Coal Co.* v. *Consolidation Coal Co.*, 434 F.2d 767 at 781 (6th Cir. 1970), we said:

> "While the stated purpose of the amendment was to protect work standards by equalizing labor costs between employees of signatories and nonsignatories, the obvious effect was to discourage signatories from purchasing or acting as sale agents for coal companies which produced coal with non-UMW laborers."

The District Court stated that the eighty cent penalty clause and the "coal lands" clause were the "legal" substitutes for the PWC clause in the 1958 agreement after PWC had been held by the National Labor Relations Board to violate Section 8(e) of the Act. *Raymond O. Lewis, et al.*, 144 NLRB 228 (1963).[2]

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[2]The ill-fated PWC (Protective Wage Clause) was litigated extensively in this Circuit. Referring to this clause in *Tennessee Consol. Coal Co.* v. *UMW*, 416 F.2d 1192 (6th Cir. 1969), *cert. denied*, 397 U.S. 964 (1970), we said:

> "The record contains an admission by counsel for UMW that the PWC was a 'quid pro quo.' Paragraph A was demanded by BCOA. Paragraph B, containing the promise of the signatory operators, was demanded by UMW. In this paragraph the operators agreed to boycott coal not produced in conformity with the national agreement. UMW faithfully complied with Paragraph A in all collective bargaining agreements which it entered into. UMW struck operators who refused to agree to the national contract. The record in *Ramsey* is replete with evidence of mass picketing, force and violence." (*Id.*, at 1198).

See also opinion of Circuit Judge O'Sullivan in *Ramsey* v. *UMW*, 416 F.2d 655 at 667 et seq. (6th Cir. 1969 en banc), and cases therein cited which affirmed the judgment of the District Court, by an equally divided court. The Supreme Court reversed the judgment of this court, which reversal was in accord with the views expressed in Judge O'Sullivan's opinion. *Ramsey* v. *UMW*, 401 U.S. 302 (1971).

See also *South-East Coal Co.* v. *Consolidation Coal Co.*, 434 F.2d 767 (6th Cir. 1970).

It was the opinion of the District Court that the primary purposes of the eighty cent penalty and the coal land clauses were to protect work opportunities and wages of UMW members and to maintain the integrity of the UMW Welfare and Retirement Fund. Much evidence was offered by UMW on the history of its bargaining and the plight of its members due to competition with other fuels, with a substantial loss of business.

Notwithstanding this, the District Court specifically found that "an object" of the 1964 strike was to force Riverton to sign the agreement containing the eighty cent penalty clause. Another object was to compel Riverton and Davison to cease doing business with, and to cease using the products of, other coal producers who were nonsignatories. The foreseeable purpose of the eighty cent clause was "the unionization of some non-union employers."

It is clear that Section 8(b)(4) of the Act forbids strike action if "an object" is to force an employer to do any of the things prohibited by Section 8(e). The statute does not mention primary object or purpose. If any object of the strike is forbidden by Section 8(b)(4), it is a secondary boycott. It is not necessary to find that it was the sole object. *NLRB* v. *Denver Bldg. & Const. Trades Council*, 341 U.S. 675 (1951).

Granting that UMW at all times desired to protect and preserve the work opportunities of its members and their pension fund, which is certainly a worthy motive, this intention does not give UMW a license to violate other laws which violation the District Court found was an object of the strike. *UMW* v. *Pennington*, 381 U.S. 657, 665 (1965).

The mandatory provisions of Section 8(b)(4) are just as binding on a labor union as is the Sherman Act. *NLRB* v. *Denver Bldg. & Const. Trades Council, supra.*

UMW argues that subcontracting is a bargainable issue, citing *Fibreboard Paper Prods. Corp.* v. *NLRB,* 379 U.S. 203 (1964). This case is inapposite for it involved the contracting out of maintenance work which was previously performed by the company's employees and such contracting out would have adversely affected them by reason of discharges and layoffs.

In our case, the supplemental coal which Riverton and Davison were purchasing from signatory and nonsignatory suppliers involved work which was never performed by their own employees. Riverton was operating at all times at full capacity, but because of lack of working capital and of mining equipment, it could not run additional mines, and it was necessary for Riverton to purchase coal to fill its orders.

The eighty cent penalty clause was not directed at job security, because Riverton could comply therewith by closing its mines, discharging all of its employees, and filling its entire requirements with coal from other signatory mines. Furthermore, Riverton could purchase coal from a signatory mine supplier whose employees were operating under substandard wages and working conditions.

The trouble is that the clauses in question here were not "addressed to the labor relations of the contracting employer [Riverton] vis-a-vis his own employees", but on the contrary, to the boycotted employers (nonsignatory suppliers), *National Woodwork Mfrs. Ass'n.* v. *NLRB,* 386 U.S. 612 (1967).

UMW further contends that multi-employer collective bargaining is permissible. *NLRB* v. *Truck Drivers Local 449*, 353 U.S. 87 (1957). But as was observed in *UMW* v. *Pennington, supra*, there are "limits to what a union or an employer may offer or extract in the name of wages and because they must bargain does not mean that the agreement reached may disregard other laws." *Id.* at 665.

It should be pointed out that while the 1958 agreement which contained the PWC was negotiated for Riverton by Southern Coal Producers Association (SCPA), Riverton did not permit SCPA to do any negotiating for it thereafter with respect to either the 1964 or 1966 contracts, concerning which it dealt directly with UMW.

The 1964 strike was a violation of the 1958 contract which the District Court held contained a "no strike" clause, relying on *Lewis* v. *Benedict Coal Corp.*, 259 F.2d 346 (6th Cir. 1958), *affirmed by an equally divided court*, 361 U.S. 459 (1960).

UMW argues that the findings of fact of the District Court that UMW authorized or ratified the 1964 strike, are not supported by substantial evidence and are clearly erroneous. We disagree.

The District Court detailed the evidence to support its findings, which included the conduct of Field Representative Emery McCoy and other UMW agents who, although they knew that the 1958 contract was still in full force and effect, led Riverton employees to believe that they did not have a contract. As these agents well knew, UMW members had a tradition of "no contract, no work." To tell them that they had no contract was the "signal" for them to strike. The strike was settled only when Riverton signed under protest the new agreement con-

taining the eighty cent penalty clause. Thus UMW also ratified the strike. The testimony to the contrary of UMW agents was not credited by the District Court. The testimony of the McCoy's was characterized by the Court as "less than candid."

UMW relies on a decision of the National Labor Relations Board in *International Union, UMW, et al.*, 188 NLRB 121 (1971), where the Board by a 3 to 2 vote upheld the eighty-cent clause.

It should be pointed out that the Board has not been consistent in its rulings on either the eighty-cent or the PWC clause. The Board first held that PWC was illegal. *Raymond O. Lewis*, 144 NLRB 228 (1963). The following year, in a supplemental decision it held the eighty-cent clause illegal. *Raymond O. Lewis, et al.*, 148 NLRB 249 (1964).

The District of Columbia Court of Appeals remanded PWC to the Board for further proceedings. *Lewis* v. *NLRB*, 350 F.2d 801 (D.C. Cir. 1965). On remand, the Board reversed itself with Chairman Brown dissenting, and found PWC legal. *W. A. Boyle, et al.*, 179 NLRB 80 (1969). Following the remand ordered in 399 F.2d 977 (D.C. Cir. 1968), and contrary to the recommendations of its trial examiner, the Board in its 3 to 2 decision (and after a change in membership) reversed itself and held that the eighty-cent clause was legal. 188 NLRB 121 (1971).

In our view, the Board decisions holding the two clauses to be illegal, appear to be better reasoned decisions. Seven Board members have held the eighty-cent clause invalid. Only three Board members and no trial examiner have held otherwise.

We do not regard the decisions of the Board as controlling on us in damage actions under Section 303. *International Longshoremen's and Warehousemen's Union* v. *Juneau Spruce Corp.*, 342 U.S. 237 (1952); *United Brick & Clay Workers* v. *Deena Artware Inc.*, 198 F.2d 637 (6th Cir. 1952), *cert denied*, 344 U.S. 897 (1952), *rehearing denied*, 344 U.S. 919 (1953); *NLRB* v. *Deena Artware*, 198 F.2d 645 (6th Cir. 1952), *cert. denied*, 345 U.S. 906 (1953); *Old Dutch Farms Inc.* v. *Milk Drivers*, 281 F.Supp. 971 (E.D. N.Y. 1968).

II

THE 1966 STRIKE

This strike, like the one in 1964, was also illegal. It violated the provisions of the 1964 "no strike" contract. It violated Section 8(d) of the Act. When the 1966 strike was conducted, the 1964 agreement was in full force and effect. It had not been terminated by either party.

The only way Riverton could terminate the strike was to sign the 1966 amendment to the national contract, which it did under protest. Upon signing it, the strike ended. UMW was successful.

The 1966 contract also contained the illegal eighty-cent penalty clause.

UMW did nothing to persuade its members to return to work other than to send them a telegram. It did not even tell them that they had a valid contract which was being violated by their work stoppage. It did not undertake to discipline the strikers. Its inaction was a form of influence and persuasion. On the other hand, UMW benefited by the strike and took advantage of that fact to get a new contract. *IBEW* v. *NLRB*, 341 U.S. 694 (1951); *Vulcan Material Co.* v. *Steelworkers*, 430 F.2d 446 (5th

Cir. 1970); *UMW* v. *Osborne Mining Co.*, 279 F.2d 716 (6th Cir.), *cert. denied*, 364 U.S. 881 (1960).

Local 1209 was not an autonomous labor organization separate and apart for UMW. It was an administrative arm of UMW and was supervised, dominated and controlled by UMW. Under the UMW constitution, UMW had the right "to reverse the action of the Local Union."

It can well be said that UMW, having the power to correct the unlawful action of the Local union, and deciding to accept the benefit of it instead of taking appropriate action to halt the strike as it was required to do under the contract, thereby induced and encouraged both the 1964 and the 1966 strike. *International Bhd. of Teamsters* v. *Humko Co.*, 287 F.2d 231 (6th Cir.), *cert. denied*, 366 U.S. 962 (1961).

The findings of fact by the District Court that UMW did not induce or encourage the 1966 strike, and did not thereby violate the Act, are not supported by evidence and are clearly erroneous.

In our opinion UMW was liable to the plaintiffs for all damages proximately resulting from the violations of the Act by UMW.

III

DAMAGES

Where liability is established, the plaintiffs are entitled to recover all damages directly and proximately resulting from the violations of the Act by UMW. We have considered the issue of damages in previous cases. *Ritchie* v. *UMW*, 410 F.2d 827 (6th Cir. 1969); *Riverside Coal Co.* v. *UMW*, 410 F.2d 267 (6th Cir. 1969) and cases therein cited; *UMW* v. *Osborne Mining Co.*, 279 F.2d 716

(6th Cir.), *cert. denied*, 364 U.S. 881 (1960). The District Court had the benefit of these decisions.

The plaintiffs asserted claims for damages in the amount of $2,587,315, but they were rejected by the Court except to the extent that the Court allowed them in the amount of $150,312.50, plus interest.

The plaintiffs contend that the damages proposed to be awarded are grossly inadequate. UMW contends that the proposed award is excessive and is not supported by substantial evidence.

In his findings of fact the District Court stated:

> "61. The plaintiff's profit-loss damage claims, totalling $2,587,315.00 are rejected except to the extent dealt with above. The claims are based on plaintiff's exhibits 52 and 53 and the testimony relative thereto. The claim broadly amounts to an assertion that an operation which in the sole preconstraint year (1963) in evidence made $95,000.00 (before taxes etc.) would have made a profit (before taxes etc.) of in excess of $500,000.00 a year over the approximate 4½ years of constraint. This was not a new company—it was long existent. We have mentioned some assumptions leading to the assertion—one more should be mentioned: The plaintiff's loss of profit claim is based on, among other assumptions, the assumption that over 2,000,000 tons of coal, involving dozens of entities and some eleven millions of dollars could and would have involved no increase in administrative expense. That is simply too speculative."

The Court found that plaintiffs had shown that during the period from April, 1962 through 1968, Riverton was unable to fill orders on hand amounting to about 800,000 tons, of which 360,000 tons are applicable to the period April 1, 1964 to April 1, 1966, and the balance of 440,000

tons is applicable to the period April 1, 1966 to September 30, 1968.

The Court then figured that the operating profit (before taxes and nonoperating expenses) was eight cents per ton, basing it on the integrated Davison and subsidiaries' operation for 1963, which was the closest period before the restraint, and it was the only year for which an operating statement was in evidence.

It was the theory of plaintiffs that they were entitled to recover the selling price of the supplemental coal less the actual cost and a sales commission. The Court was of the view that the purchase and sale of 800,000 tons of coal over a period of four and one-half years would entail administrative expense. We do not regard this finding as unreasonable. If plaintiffs contend that the Court should have considered years other than 1963, they should have furnished operating statements in support of their contention.

The Court allowed $15,000 for settlement of the breach of contract action instituted by Ford Coal Co., (which contract Davison was unable to fulfill because of its inability to acquire the coal) and for attorneys' fees and expenses. The Court was of the view that the settlement of an $850,000 lawsuit for $15,000 was a good settlement.

The Court further allowed damages for unavoidable fixed costs and expenses during the 1964 and 1966 strikes.

Other claims were made by plaintiffs which the Court rejected as speculative.

We do not say that a much larger award could not be sustained. We do hold that the award was within the range of the evidence and we are not inclined to disturb

it. This was a difficult case to try, and the District Judge handled it well.

In our opinion, Riverton and its parent corporation Davison are proper parties to bring the action.

The claim of UMW that the award is excessive is clearly without merit.

The judgment of the District Court will be reversed and the cause remanded to the District Court for entry of a judgment in favor of plaintiffs in the amount of $150,312.50, plus interest.

Filed January 21, 1972

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 71-1021

RIVERTON COAL COMPANY AND
DAVISON FUEL AND DOCK COMPANY,
Plaintiffs-Appellants,

VS.

UNITED MINE WORKERS OF AMERICA,
Defendant-Appellee.

BEFORE: PHILLIPS, Chief Judge, WEICK and CELEBREZZE, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Southern District of Ohio

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case remanded to the District Court for entry of a judgment in favor of plaintiffs in the amount of $150,312.50, plus interest.

It is further ordered that Plaintiffs recover from Defendant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

JAMES A. HIGGINS
Clerk.

Filed January 21, 1972

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 71-1022

RIVERTON COAL COMPANY AND
DAVISON FUEL AND DOCK COMPANY,
Plaintiffs-Appellants and
Plaintiffs-Appellees,

VS.

UNITED MINE WORKERS OF AMERICA,
Defendant-Appellee and
Defendant-Appellants

BEFORE: PHILLIPS, Chief Judge, WEICK and CELEBREZZE, Circuit Judges.

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Entered by order of the Court.

JAMES A. HIGGINS
Clerk.

APPENDIX C

Labor Management Relations Act, 1947, as Amended:

29 USCA 152(13) [Section 2(13) of the Act]:

When used in this subchapter—

* * * *

(13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. July 5, 1935, c. 372, § 2, 49 Stat. 450; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 137.

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29 USCA 158(b) (4) [Section 8(b) (4) of the Act]:

* * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

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29 USCA 158(d) [Section 8(d) of the Act]:

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect

to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until

the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158-160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

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29 USCA 158(e) [Section 8(e) of the Act]:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforc-

ible and void . . . July 5, 1935, c. 372, § 8, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140; Oct. 22, 1951, c. 534, § 1(b), 65 Stat. 601; Sept. 14, 1959, Pub. L. 86-257, Title II, § 201(e), Title VII, §§ 704(a)-(c), 705(a), 73 Stat. 525, 542, 545.

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29 USCA 185(e) [Section 301(e) of the Act]:

Suits by and against labor organizations—Venue, amount, and citizenship

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.

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29 USCA 187 (Section 303 of the Act):

Unlawful activities or conduct; right to sue; jurisdiction; limitations; damages

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.

(b) Whoever shall be injured in his business or property by reason or[1] any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount

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[1] So in original. Probably should read "of".

in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit. June 23, 1947, c. 120, Title III, §303, 61 Stat. 158; Sept. 14, 1959, Pub. L. 86-257, Title VII, §704(e), 73 Stat. 545.

APPENDIX D

73 Harvard Law Review 1086, 1119:

Aaron, "The Labor-Management Reporting and Disclosure Act of 1959", writing on Section 8(e):

> "As long as the union can show that the subcontracting provision will directly benefit employees covered thereby, *its other motives, as well as the incidental effects of such an arrangement on outsiders, should not be made the basis for declaring the agreement illegal.*"

62 Michigan Law Review 1176, 1187 (May, 1964):

David M. Ebel, "Subcontracting Clauses and Section 8(e) of the National Labor Relations Act":

> "This incidental secondary objective, however, is quite different from the tainted secondary pressure embodied in a hot-cargo clause whereby a union deliberately uses one employer as a battering ram to break down another employer's resistance to certain union demands. It possesses neither the tendency to enlarge outside labor disputes nor the capacity to involve neutral employers in foreign altercations. *Therefore, the inevitable presence of such an incidental objective should not be sufficient to condemn the subcontracting clause.*"

SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1346

UNITED MINE WORKERS OF AMERICA,
Petitioner,

vs.

RIVERTON COAL COMPANY and DAVISON FUEL AND DOCK COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

1. WHETHER THE PETITIONING LABOR ORGANIZATION VIOLATED SECTIONS 8(b)(4)(i)(ii)(B) OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, AS AMENDED, WHEN IT ENGAGED IN, INDUCED AND ENCOURAGED INDIVIDUALS EMPLOYED BY THE RESPONDENT RIVERTON TO ENGAGE IN STRIKES IN 1964 AND 1966 AND ALSO THREATENED, COERCED AND RESTRAINED RIVERTON, AN OBJECT OF WHICH WAS TO REQUIRE RIVER-

TON AND THE RESPONDENT DAVISON TO CEASE USING, SELLING, HANDLING, TRANSPORTING OR OTHERWISE DEALING IN THE PRODUCTS OF OTHER COAL PRODUCERS, TO CEASE DOING BUSINESS WITH SUCH OTHER PERSONS, AND TO FORCE OR REQUIRE SUCH OTHER EMPLOYERS TO RECOGNIZE OR BARGAIN WITH THE PETITIONING LABOR ORGANIZATION AS THE REPRESENTATIVE OF EMPLOYEES OF SUCH OTHER EMPLOYERS AT A TIME WHEN THE PETITIONING LABOR ORGANIZATION HAD NOT BEEN CERTIFIED AS THE REPRESENTATIVE OF SUCH EMPLOYEES UNDER THE PROVISIONS OF SECTION 9 OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED.

2. WHETHER THE PETITIONER VIOLATED SECTION 8(b)(4)(i)(ii)(A) WHEN IT ENGAGED IN THE CONDUCT DESCRIBED IN PARAGRAPH 1 ABOVE WHERE AN OBJECT THEREOF WAS FORCING OR REQUIRING THE RESPONDENT RIVERTON TO ENTER INTO AN AGREEMENT PROHIBITED BY SECTION 8(e) OF THE ACT.

3. WAS THE RESPONDENT DAVISON A PROPER PARTY PLAINTIFF TO THE ACTION BELOW UNDER THE PROVISIONS OF SECTION 303(b) OF THE LABOR MANAGEMENT RELATIONS ACT, 1947?

4. ARE THE DECISION OF THE COURT OF APPEALS AND THE JUDGMENT DIRECTED FOR THE RESPONDENTS SUPPORTED BY SUBSTANTIAL EVIDENCE?

STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions cited on page 4 of the petition, this case involves Section 302(c)(5) of the Labor Management Relations Act, 1947, which generally forbids the payment of money by an employer to a labor union but also states:

> "The provisions of this section shall not be applicable * * * (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That * * * (B) the detailed basis on which such payments are to be made is specified in *a written agreement with the employer* * * *." (Emphasis added)

Other pertinent provisions are:

> "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to *bargain collectively through representatives of their own choosing*, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities* except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)." (Emphasis added)

> "Sec. 9. (a) *Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such pur-*

poses, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievance adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment. (Emphasis added)

"(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons

on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

"(c)(1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an *election* by secret ballot and *shall certify the results thereof.*" (Emphasis added)

STATEMENT OF THE CASE

The "Statement of the Case" in the Petition is laced with irrelevancies, misstatements of fact, expressions of opinion and significant omissions. The controlling facts as viewed by the Respondents are summarized as follows:

The Respondent Riverton and Davison[1] brought an action for damages against the Petitioner under Section 303 of the Labor Management Relations Act, 1947, as amended (29 U.S.C. §187), charging Petitioner with violations of Section 8(b)(4) of the Act. A jury was waived and the case was tried to the court. Findings of fact and conclusions of law were filed on October 8, 1970. (32-89; A-1a-60a)[2] The District Court concluded that the Petitioner had not violated the above section of the Act. However, recognizing the "closeness of the question involved" (75) and the "particularly difficult" nature of the case (82), the Court did determine that the Respondents should recover a total of $150,312.50 plus interest on certain items of damages if the issue of liability was subsequently determined in favor of the Respondents and against the Petitioner. (87-89)

A. The Parties.

Riverton, a West Virginia corporation, engages in interstate commerce in the business of mining coal and loading river barges on the Kanawha River at Crown Hill and Marmet, West Virginia. (32-33) Davison is an Ohio cor-

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1. Hereinafter Respondent Riverton is sometimes referred to as "Riverton"; Respondent Davison as "Davison" and Petitioner as "UMW."

2. We are employing the record citation system used by the Petitioner and described in footnote 4 on page 5 of the Petition. The abbreviation "A-____a" refers to the Appendix to the Petition for Certiorari. Page references enclosed in parentheses refer to the Joint Appendix or to the Supplemental Appendix filed in the Sixth Circuit and in this Court's Clerk's office.

poration with offices at North Bend, Ohio, engaged in interstate commerce in the business of selling coal. At all material times, Riverton was a wholly owned subsidiary of Davison. Davison acted as exclusive sales agent for all of Riverton's mined and purchased coal. Davison owned coal lands but produced no coal and participated in no collective bargaining negotiations with UMW and executed no UMW contracts. (33)

Petitioner is an unincorporated association and a labor organization with headquarters in Washington, D. C. and a District office in Charleston, West Virginia. It served as exclusive bargaining representative of certain employees employed by Riverton working in its coal mines and on its docks in West Virginia. At all relevant times in its relations with the Respondents, District 17 of the Petitioner was acting as agent for the Petitioner. (33-34) The employees of Respondent Riverton belonged to Local 1209 which was a duly chartered local and subordinate branch of the Petitioner. (34; A-75a)

Effective December 1, 1958, Riverton entered into a collective bargaining agreement with Petitioner, which, by its terms, was,

> "* * * not subject to termination by any party signatory hereto prior to November 30, 1959, PROVIDED, HOWEVER, That either the parties of the first part or the party of the second part may terminate this Agreement on or after November 30, 1959, by giving at least sixty (60) days' written notice to the other party of such desired termination date." (44)

B. Respondent Riverton's History of Purchasing Coal.

The purchasing of coal by one producer from another is an essential marketing practice in the bituminous coal industry. (39) Riverton had contracts with companies in

the utility industry. (731-757; 778-783) Producers entering into such contracts often need to supplement their own production in order to meet delivery schedules. (39; 61-62) For years it had been customary for Riverton to buy coal to supplement its own production in order to fulfill sales contracts and meet market requirements. (35; 107) Although Riverton operated its own mines to full capacity, it was unable to mine enough coal to meet its requirements because of its limited financial resources and lack of mining equipment. (35; 107; 146-147; 203-204)

During the calendar years 1962 and 1963, Davison sold 2,170,000 tons of coal of which 967,354 tons, or 44-1/2%, was coal which had been purchased by Respondents Riverton and Davison from other coal operators. (40; 883; 923) Coal was purchased from mine operators signatory to agreements with the Petitioner, as well as from operators not signatory to any of the Petitioner's agreements. (40; 730-731) During the nine calendar months before April 1964, 78% of the coal purchased by Riverton came from non-UMW signatory mines and 22% came from UMW signatory mines. (40; 693-711) *The base price of coal purchased by Riverton was the same for signatory and non-signatory suppliers.* (40; 116-117) Some suppliers operated mines on lands in which Riverton and Davison had no ownership or tenancy interest. (110; 693-729) Some operated mines on lands owned by Davison and leased to them by Riverton. Others operated mines on lands leased by Riverton from third parties, and in turn, leased to the suppliers. (142; 693-729) Riverton leased coal lands to these suppliers because it could not profitably mine the land or did not possess the necessary mining equipment to remove the coal. (203)

C. The Events of 1963.

During the fall of 1963, the Petitioner, through President Humphreys of its District 17, specifically called to the attention of Riverton the fact that Riverton was doing business with non-union operators operating under leases from Riverton on lands controlled by Riverton. The purpose of this conference was to secure the "help" of Riverton in organizing such non-union operators in exchange for "consent" by the UMW to a business enterprise Riverton was interested in. (50; 125-126) Officials of Riverton did not agree to cooperate with the UMW in this proposal. (126)

Later, in November 1963, Petitioner's District 17 Vice President Neal called Riverton's Executive Vice President to find out what Riverton was doing to force non-signatory operators to become signatories to Petitioner's contract. (126-127) Vice President Davison asked Neal for a list of the operators he was concerned with. (127) Shortly thereafter, Davison received Neal's letter enclosing a list of non-signatory operators that Riverton was to get "signed up as signatory operators." (127-128; 783-784) No claim was made or evidence proffered that any employees of these non-signatories wanted to be represented by the Petitioner. Riverton took no action to induce any of the non-signatory operators to become signatories to a contract with Petitioner. (128)

D. The 1964 Strike and Collective Bargaining Agreement.

Riverton was a member of Kanawha Coal Operators Association. (KCOA) The Association handled Riverton's grievances with the Petitioner. At relevant times, neither Riverton nor KCOA was a member directly or indirectly of the Bituminous Coal Operators Association (BCOA) which negotiates national or regional agreements for its members with the Petitioner. Riverton did not authorize

anyone, KCOA, BCOA or Southern Coal Producers Association (SCPA), either to negotiate for Riverton, or to agree for Riverton in 1964 or 1966. Riverton was not, in either year, a member of any "multiemployer" bargaining group. (36-37) Neither Riverton nor UMW gave the 60-day written notice required by the collective bargaining agreement as a condition to termination of the agreement.

On April 2, 1964, the Petitioner's Field Representative, Emery McCoy, called on Lewis Davison, President of Riverton. McCoy, under the mistaken belief that Riverton had previously signed the Petitioner's 1964 proposed agreement, asked whether other mine companies operating on lands leased from Riverton had signed the agreement. (183-184) Davison answered that Riverton had not signed. McCoy warned that, "There probably will be trouble" when Riverton's employees represented by the Petitioner found out that Riverton had not signed. (183-184) Davison asked McCoy what he meant and McCoy replied, "Well, the men don't like to work without a contract, and there will probably be some trouble of some kind." (184)

For many years, as McCoy and Petitioner's members knew, the Petitioner has had a tradition of "no contract, no work." (53; 421; 424; 427; 438) Although the Petitioner and its representatives knew its members employed by Riverton would not work without a contract and that Riverton's 1958 contract had not been terminated but was still in full force and effect, the Petitioner took no steps to advise its members of these facts. (53-54; 367-368; 287; 392-393; 396-397; 398-400) Instead, when employees of Riverton asked Emery McCoy on April 10 if Riverton had a contract with the Petitioner, he "told them that they didn't have one" despite the fact that there was such a contract in existence. (54-55; 420) The District Judge explicitly found "as an ultimate finding of fact" that this

> "action of the District Representatives, in its context, was the equivalent of a 'signal' to 'strike' and was so intended by the District Representatives and the men. The Union instructed its members to strike, not by direct viva voce but in 'union lingo'—as well understood by all concerned as is the Blackwood referred to now, by some, as 'Back-woods' convention by a bridge player." (54)

In response to McCoy's "signal", a strike of Riverton's employees commenced on April 10. On the evening of April 10, 1964, Arby McCoy, Financial Secretary-Treasurer and Chairman of the Mining Committee of Petitioner's Local Union 1209 at Riverton (423) and Edward Perry, a member of the Mining Committee, both of whom were employees of Respondent Riverton, (426) began stopping trucks entering the Riverton tipple at Crown Hill, West Virginia. (184-186; 426-427) The work stoppage continued until the evening of April 15, 1964. (50)

Lewis Davison talked to Arby McCoy and Perry as they were stopping the trucks. (193-194) Davison asked McCoy what he and the other men with him were doing and McCoy replied, "Well, the men don't want to work without a contract." (193) When Davison responded that "the Union has never served 60-day notice", McCoy retorted, "Well, the men won't work without a contract, that is it." (193) The District Judge expressly found that:

> "The union employees of Riverton did, in fact and law, have a binding contract extending to April 15, 1964, at least, i.e., the 1958 contract negotiated by the employees' bargaining agent." (50)

The District Court found that:

> "An object of the April, 1964, strike at Riverton was to force or require Riverton to enter into the proposed

1964 printed form amendment to the National Bituminous Coal Wage Agreement of 1950." (55)

On April 13, Lewis Davison went to the Petitioner's District headquarters in Charleston, West Virginia, and asked District President Humphreys for a copy of the Petitioner's 1964 proposal which the Petitioner wanted Riverton to sign. (187) Humphreys gave Davison a printed document entitled "National Bituminous Coal Wage Agreement of 1950 as Amended Effective April 2, 1964." (187-188) Davison asked Humphreys, "Well, what is it going to take to get the men back to work." (187) Humphreys answered, "Sign the contract." (187) Davison declined to sign at that time. (187)

On April 13, Riverton wired W. A. Boyle, the Petitioner's President, and Raymond Humphreys, stating:

> "To settle this illegal strike we are willing to sign this Agreement and put the wage increase into effect if you will eliminate two sections entitled 'United Mine Workers of America Welfare and Retirement Fund of 1950' and 'Application of Contract to Coal Lands.' We are advised that these two clauses are illegal. Are you willing to omit them or suggest modifications which will be legal? We are willing to continue the welfare and retirement fund provisions of our current contract with your union for the duration of the new Agreement paying 40¢ per ton due to the fund as in the past on each ton of bituminous coal produced by us for use or sale." (A-21a-22a)

On the following day, R. O. Lewis, Petitioner's Vice President, telegraphed Riverton from Washington, D. C. declining Riverton's proposal to omit or modify the two sections of the agreement in question and claiming that the work stoppage was a "voluntary protest of your employees against your failure to execute the new Agreement."

(810) The provisions of the proposed agreement referred to in Riverton's telegram of April 13 were the two provisions at issue in this case, commonly referred to as the "80-cent penalty clause" and the "coal lands clause." (52-53) In relevant part, the 80-cent penalty clause read:

> "UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950
>
> "* * * During the life of this agreement there shall be paid into such Fund by *each Operator signatory hereto* the sum of *forty cents (40¢) per ton* of two thousand (2,000) pounds on each ton of bituminous coal *produced by such Operator* for use or for sale. On all bituminous coal procured or acquired by any signatory Operator for use or for sale (i.e., all bituminous coal other than that produced by such signatory Operator), there shall, during the life of this Agreement, be paid into such Fund by each such *Operator signatory* hereto or by any subsidiary or *affiliate* of such Operator signatory hereto the sum of *eighty cents (80¢) per ton* of two thousand (2,000) pounds on each ton of such bituminous coal so *procured or acquired on which the aforesaid sum of forty cents (40¢) per ton had not been paid* into said Fund *prior to such procurement* or acquisition." (606-07; emphasis added)

In relevant part, the coal lands clause read:

> "APPLICATION OF CONTRACT TO COAL LANDS
>
> "As part of the consideration of this agreement, the Operators signatory hereto agree that *this Agreement covers the operation of all the coal lands, coal producing and coal preparation facilities owned or held under lease by them*, or any of them, *or by any* subsidiary or *affiliate* at the date of this Agreement, or acquired dur-

ing its terms which may hereafter (during the term of this Agreement) be put into production or use * * *." (608; emphasis added)

On April 15, following receipt of the telegram from R. O. Lewis, Riverton notified the Petitioner that in order to end the strike it would sign the Petitioner's 1964 contract and asked the Petitioner to send Emery McCoy to Riverton's office with copies for signature. (188) That afternoon, McCoy and several members of the Local 1209 Mining Committee came to Riverton's office at Crown Hill, West Virginia, and presented the contract for signing. (188-189) Lewis Davison signed the contract (605-609), stating that he was doing so "under protest, under coercion because of illegal strike", whereupon McCoy turned to the Committee and said, "Get the men back to work on the evening shift." (188) The employees then promptly returned to work and the strike ended. (188) The agreement Lewis Davison signed was entitled the "National Bituminous Coal Wage Agreement of 1950 as Amended Effective April 2, 1964" and contained the two clauses in question in this case. (52-53; 606-608)

E. The 1966 Strike and Collective Bargaining Agreement.

The 1964 agreement was to continue in effect until March 31, 1966 and was subject to termination on or after that date by either party giving sixty days' written notice of termination. (56) Neither party gave a termination notice. (56) Despite this, on April 12, 1966, and continuing until April 27, 1966, employees of Riverton represented by the Petitioner engaged in another strike. (56-57) In order to end the strike, the Petitioner forced Riverton to sign a new printed form agreement entitled "National Bituminous Coal Wage Agreement of 1950 as Amended Effective April 1, 1966" despite the fact that the 1964 agree-

ment was still in effect. The strike ended as soon as Riverton agreed to sign under protest. (56) The District Judge found that:

> "* * * *prior to execution the defendant Union was informed in writing that the provision of the printed form entitled 'United Mine Workers of America Welfare and Retirement Fund of 1950' was unlawful and that Riverton was signing 'under protest.'*" (56; emphasis added)

The Court found that the 1966 agreement "carried forward and preserved the terms and conditions of the said previous agreements, including the 40-80 cent welfare clauses * * *" and also carried forward the coal lands clause in such agreement. (56-57) Disregarding the presumption of continuing status and the protests of Riverton, the District Court concluded that, "The object of the 1966 strike was not related to the 40-80 cent clause" (58) and that, "There is certainly no connection whatever between the 80-cent clause in either the 1964 or 1966 contract and the 1966 strike." (86) The Court of Appeals reversed such conclusions, observing that "UMW benefited by the strike and took advantage of that fact to get a new contract." (A-74a) The District Court observed that "Riverton signed under express protest to the 80-cent clause based on the claimed illegality thereof". The Court also found that:

> "The defendant took no affirmative action, other than above described, to end the strike, but, as noted above, it did not ratify by such inaction—nor did it encourage as in the case of the strike at Riverton in 1964." (58)

This finding by the District Judge was set aside by the Court of Appeals as authorized in Rule 52(a) of the Federal Rules of Civil Procedure, the Court stating:

> "The findings of fact by the District Court that UMW did not induce or encourage the 1966 strike, and did

not thereby violate the Act, are not supported by evidence and are *clearly erroneous.*" (A-75a; emphasis added)

UMW witness Emery McCoy, a representative of the Petitioner, admitted that he attended a meeting of Riverton Local 1209 on April 16, 1966 at which "they voted not to work." (410) Again, as in 1964, McCoy failed to tell the men that Riverton already had a contract in existence. (412) The District Judge found that Local 1209 was a "subordinate branch of the defendant Union" (34) and that "The District took no steps to penalize Riverton's striking employees." (59)

F. The Impact of the 80-Cent Penalty and Coal Land Clauses.

Following execution by Riverton of the 1964 agreement with the Petitioner and continuing thereafter through the 1966 agreement, Riverton bought no more coal from non-signatory suppliers. (55; 59) The District Court found:

> "This was because, under the new agreement, the terms of the agreement were applicable to all suppliers of Riverton or Davison and a Welfare Fund payment of 80 cents a ton was required to be paid on all coal bought from non-signatories." (55)

The President of Riverton informed all suppliers that:

> "* * * because we had signed this 1964 agreement * * * that they would have to become signatory to the contract and furnish me with a letter saying they were a signator before I could buy any more coal from them." (194)

Thereafter, as some suppliers signed up, the UMW informed Riverton of this fact so Riverton could resume pur-

chasing their coal. (194-195; 664-691) The same procedure was used after Riverton executed the 1966 agreement with the UMW under protest. (197; 679-691)

Many suppliers did not become signatory to the Petitioner's contract and thus were precluded from selling coal to Riverton. (731) Riverton could not make up its loss of the purchases from non-signatory suppliers. (55-56) All of its mines continued to operate at full capacity, but Riverton could not acquire enough UMW signatory coal to supplement its own production within a range of economic delivery at a price it could pay and realize a profit. (55-56; 169; 146-147)

During 1962-1963 Riverton's coal purchases from other suppliers averaged 40,000 tons a month. (61) In March, 1964, the last month before the 80-cent penalty clause and coal lands clause became effective, purchases by Riverton were 41,568 tons. (61) In the first month after the clauses became effective, purchases dropped to 26,119 tons. (61) During the remainder of the calendar year of 1964, they averaged 24,930 tons a month. (61) In the calendar year 1965 tonnage purchased averaged less than 23,000 tons a month, and in 1966 the average was 21,194 tons and in 1967 was 26,800 tons a month. (61) The District Court found that:

> "The reduction in purchases of supplemental coal by Riverton after April, 1964, were a consequence of the coal lands clause and the 80-cent penalty provision included in the 1964 agreement which Riverton signed as a result of the strike action of April 10-15, and in the 1966 agreement." (61)

The lower court found that:

> "After Riverton signed the 80-cent clause, and as a result thereof, some fifteen non-union producers from

which Riverton had been buying supplemental coal became signatories to the UMW agreement." (55)

It was necessary for the suppliers to become signatory to the Petitioner's agreement in order to lift the 80-cent penalty on their coal. (82) Under Section 302(c)(5) of the Labor Management Relations Act, 1947, as amended (29 U.S.C. §186(c)(5) only employers who are *signatory* to an agreement with the Petitioner may make contributions to the United Mine Workers Welfare and Retirement Fund of 1950. (43-44; 82) It was thus impossible for non-signatory operators to pay the normal 40-cent per ton welfare payment without becoming a party to all the provisions of the Petitioner's contract. (82) The employees of Riverton's suppliers who were thus forced to sign a contract with the Petitioner had never designated the Petitioner as their collective bargaining representative, and the Petitioner had never been certified as the representative of such employees after a secret ballot election conducted by the National Labor Relations Board under the provisions of Section 9 of the Labor Management Relations Act, 1947, as amended, (29 U.S.C. §159) (55), as required to validate boycott action under 8(b)(4)(B). (29 U.S.C. §158(b)(4)(B).

The 80-cent penalty and coal lands clauses of the 1964 and 1966 agreements with the Petitioner made Riverton responsible for the payment of an 80-cent per ton penalty to the Petitioner's Welfare Fund on all coal purchased by Davison from non-signatory operators. (62) Before the execution of the 1964 agreement by Riverton, Davison had entered into a written agreement with the Ford Coal Company on January 30, 1964. (62) Under this agreement, Davison agreed to buy 1,000 tons of coal per day from Ford for a period of two years at a specified price. (62) After Riverton entered into the 1964 agreement with Petitioner,

Davison notified Ford it could no longer purchase coal unless Ford became a UMW signatory operator. (62) Ford refused and Davison, in violation of the provisions of its contract with Ford and in an effort to comply with the provisions of the agreement which had been entered into by Riverton with the Petitioner, declined to purchase further coal from Ford. (62) The District Court found, "The breach and refusal were caused by the 80-cent clause in the 1964 union contract." (63) Ford sued Davison and the suit was settled for $15,000. (63)

G. The Decision of the District Court.

The District Court concluded that the Petitioner "in 1964 induced and encouraged individuals employed by [Riverton] to engage in a strike" and "also threatened, coerced and restrained [Riverton] as those words are used in 8(b)(4)(A) and (B)" and that:

> "An object, and by far the primary object, of such conduct was to force and require Riverton to enter into the 1964 agreement containing the 80-cent clause * * *." (84)

The District Court also found that:

> "another object of the said strike was to force or require Riverton and Davison to cease using, selling, handling, transporting or otherwise dealing in the products of coal producers who were not signatories to an agreement with the defendant Union and to cease doing business with such producers." (55)

The Court said that:

> "* * * in other words, the strike-force coercion threat was directly and primarily related to the 80-cent clause. A proximate result of the 80-cent clause to

Riverton was to force it to cease dealing in the products of other producers of coal, i.e., producers who were not unionized." (84-85)

The Court also concluded that:

"Another proximate result was the forcing of some then non-union producers to unionize and in that sense a proximate result of the clause was bargaining by the Union as the representative of employees it did not represent as a matter of certification." (84-85)

The Court also concluded that:

"With respect to the 1966 strike, there is no evidence in this case based on which this Court could say that the plaintiff has maintained the burden of proving by a preponderance that District 17, or the defendant, either authorized or ratified the 1966 strike at Riverton." (86)

The Court further concluded that the facts summarized above did not establish a violation of the Act because,

"The primary, and clearly primary, purpose of [the 80-cent clause] was to tackle in a successful way a legitimate problem of subcontracting and work preservation which had existed for decades and had been attacked for decades in unsuccessful contractual methods." (83)

The Court said that:

"A secondary effect of each of these clauses was the protection of the Welfare Fund—clearly a legitimate primary (in a labor sense) target. A secondary effect of each of these clauses was the unionization of some non-union employers. It was foreseeable and in that sense was a purpose at the time the clauses were negotiated." (83-84)

After referring to "the closeness of the question involved here" (75), the Court proceeded to make findings on the damage issue "so that if there be a reversal on liability, the facts which raise the question for decision will be before the reviewing court." (87) The Court then concluded that "if the issue of liability should have been determined in favor of the plaintiff and against the defendant, the plaintiff should recover" damages in the total amount of $150,312.50 with interest and costs. (87-89)

H. The Decision of the Court of Appeals.

The Court of Appeals reversed the Trial Judge on the merits and directed entry of judgment for the Respondents in the amount found appropriate by the Trial Judge. The Court concurred with the Trial Judge that the Petitioner had induced and encouraged the 1964 strike and had threatened and coerced Riverton, forcing Riverton to agree to the 1964 agreement containing the 80-cent clause. The Court reversed the findings of the Trial Judge with respect to the 1966 strike, holding that the District Court's findings that the Union did not induce or encourage such strike "are not supported by evidence and are clearly erroneous." The Court noted the District Court's specific findings

> "* * * that 'an object' of the 1964 strike was to force Riverton to sign the agreement containing the eighty cent penalty clause. Another object was to compel Riverton and Davison to cease doing business with, and to cease using the products of, other coal producers who were non-signatories. The foreseeable purpose of the eighty cent clause was 'the unionization of some non-union employers.'" (A-70a)

The Court then noted that:

> "It is clear that Section 8(b)(4) of the Act forbids strike action if 'an object' is to force an employer

to do any of the things prohibited by Section 8(e). The statute does not mention primary object or purpose. If any object of the strike is forbidden by Section 8(b)(4), it is a secondary boycott. It is not necessary to find that it was the sole object. *NLRB* v. *Denver Bldg. & Const. Trades Council*, 341 U.S. 675 (1951)." (A-70a)

The Court accepted the finding and conclusion of the District Judge that "Riverton and its parent corporation Davison are proper parties to bring the action", and while indicating its belief "that a much larger award" could be sustained, accepted the District Court's determination of the amount of damages, stating that "the award was within the range of the evidence and we are not inclined to disturb it." (A-77a-78a)

SUMMARY OF ARGUMENT

This case presents no novel legal questions but instead involves the routine application of established statutory construction and principles of law.

Riverton operates coal mines in West Virginia and is a wholly owned subsidiary of Davison. Davison owns lands mined by Riverton, participates in the handling of coal mined by Riverton and certain of Riverton's suppliers, and receives a commission for handling and selling such coal. Riverton mined as much coal as it could with its existing equipment and financing. For many years it had been customary for Riverton to supplement its needs with coal purchased from other mines. Most, but not all, of these mines were non-union. Riverton paid the same price for coal purchased from non-union and union suppliers. In 1964, the UMW threatened Riverton with strike action and later induced and encouraged a strike against Riverton in breach of contract for the purpose of forcing Riverton to terminate its existing labor agreement and substitute a new

agreement containing so-called "80-cent penalty" and "coal lands" clauses. Under these clauses, Riverton could no longer buy coal from non-union mines without paying an 80-cent a ton penalty to the UMW pension fund. The clauses were also binding on Davison as an "affiliate" of Riverton. An object and effect of the clauses was to make Riverton stop doing business with non-union mines and handle only the products of mines which were signatories to a UMW agreement.

In 1966, the UMW again induced and encouraged strike action against Riverton in breach of contract in order to compel Riverton to execute a new collective bargaining agreement which also contained the above clauses. In both 1964 and 1966, Riverton yielded to the UMW strike pressure and accepted the 80-cent penalty clause and the coal lands clause "under protest."

Riverton and Davison sued the UMW under Section 303 of the Act for damages resulting from the UMW strike action and the restrictions contained in the 1964 and 1966 agreements, alleging that the UMW's actions violated Section 8(b)(4)(A) (B) and 8(e) of the Act.

After hearing the case without a jury, the trial judge both found and concluded that Riverton and Davison were proper parties plaintiff, that the UMW had engaged in coercive action against Riverton; also, that the UMW coercion had secondary objects; that one of these secondary objects was to force Riverton to sign an agreement containing the above clauses whereby Riverton and Davison were forced to stop doing business with non-union mines; also that "unionization of some non-union employers" was "foreseeable and in that sense was a purpose at the time the clauses were negotiated"; also, that "another effect" of the strike was "to encourage coal producers selling coal to Riverton or Davison to recognize or bargain with UMW

even though UMW had not been certified as the representative of" the employees of such producers.

The District Court also found, however, that "the primary purpose for exacting the 80-cent clause bargain" was "to prevent subcontracting, preserve Riverton's employees' work, maintain union standards in the production of coal" and to "protect the integrity of the Welfare Fund." Because the District Judge concluded this was the "primary" purpose of the UMW coercion against Riverton, he entered judgment for the UMW despite the finding of other objectives specifically forbidden by the language of Section 8(b)(4). Because he considered the question a close one, the District Judge proceeded to find the amount of money damages to which Riverton and Davison would be entitled if judgment should have been entered for them. The amount of damages was $150,312.50 with interest and costs.

The Court of Appeals for the Sixth Circuit reversed the District Court's judgment of dismissal and directed the entry of judgment for Riverton and Davison in the amount of $150,312.50 with interest and costs. Citing the decision of this Court in *NLRB* v. *Denver Building and Construction Trades Council*, the Court of Appeals stated:

> "It is clear that Section 8(b)(4) of the Act forbids strike action if 'an object' is to force an employer to do any of the things prohibited by Section 8(e). The statute does not mention primary object or purpose. If any object of the strike is forbidden by Section 8(b)(4), it is a secondary boycott. It is not necessary to find that it was the sole object."

The decision of the Court of Appeals does not conflict with applicable decisions of this Court. Also, there is no direct conflict between the Circuits on the question presented.

As this case meets none of the accepted standards for granting certiorari, it should be denied.

REASONS FOR DENYING THE WRIT

1. On the Facts Found by the District Court, Riverton and Davison Were Entitled to Judgment As a Matter of Law.

a. The UMW coerced Riverton and Davison.

The facts and findings of the District Court with respect to the actions of the UMW in 1964 are summarized in Section D of the *Statement of the Case, supra.* Riverton bargained for itself, and not as a member of any multi-employer bargaining group. (36-37) On April 2, 1964, the UMW Field Representative, Emery McCoy, threatened Riverton that, "There probably will be trouble" when Riverton's employees represented by the UMW learned that Riverton had not yet signed the new agreement negotiated by the UMW with the Bituminous Coal Operators Association, containing the 80-cent penalty and coal lands clauses. (183-184) Riverton's President asked McCoy what he meant and McCoy answered, "Well, the men don't like to work without a contract, and there will probably be some trouble of some kind." (184) These threats by McCoy were binding on the UMW. (34; Act, Section 301(e) and 303(b)) In view of their objects, hereinafter discussed, the threats in themselves constituted a violation of Section 8(b)(4)(ii)(A) and (B), as the District Court found. (84, par. 4)

The Union members had a practice of not working without a contract. (193; 421; 424; 427; 438) At the Union meeting on April 10, at which the strike was voted, Riverton employees asked UMW representative, Emery McCoy, if Riverton had a contract with the Union. McCoy "told them they didn't have one" although he knew such a contract was in existence. (54-55; 420) The strike followed. The District Judge found that this misrepresentation by

McCoy "in its context, was the equivalent of a 'signal' to 'strike' and was so intended by the District Representatives and the men."[3] He found that this "signal" was "in 'union lingo' " and was "well understood by all concerned." (54)

In addition to the activities of UMW District Representative, Emery McCoy, referred to above, the Financial Secretary-Treasurer and Chairman of the Mining Committee of UMW Local 1209, whose name was Arby McCoy, in company with Edward Perry, a member of the Local Mining Committee, began stopping trucks on April 10. (184-186; 426-427) A Riverton official asked them what they were doing, and Arby McCoy answered, "Well, the men don't want to work without a contract." (193) When reminded that there was a contract in existence, McCoy merely retorted, "Well, the men won't work without a contract, that is it." (193)

When Riverton official, Lewis Davison, asked the UMW District President Humphreys on April 13, "Well, what is it going to take to get the men back to work?", Humphreys answered succinctly, "Sign the contract." (187-188) The contract referred to was a printed document handed by Humphreys to Davison entitled "National Bituminous Coal Wage Agreement of 1950 as Amended Effective April 2, 1964" and contained the 80-cent penalty clause and the coal lands clause which are the subjects of this litigation. (187-188)

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3. The statement on page 22 of the Petition herein that "the district court, finding 'Something affirmative is required before a conclusion of "union authorization" is justified', found such requirement in the 1958 Agreement's 'integrity' provision and *not 'the quasi-affirmative expression of District 17 on April 10, 1964, that there was no contract between Riverton and the Riverton workers'* declaring, 'There was' " is clearly erroneous. The District Judge specifically stated that he found the "Something affirmative" not only in the "1958 agreement's 'integrity' provision" *but also "in the quasi-affirmative expression of District 17 on April 10, 1964 that there was no contract between Riverton and the Riverton workers. There was."* (54-55; emphasis added)

On April 13, when Riverton wired W. A. (Tony) Boyle, the UMW President, that Riverton would sign the proposed agreement if the 80-cent clause and the coal lands clause were deleted, the UMW refused. (808-810)

As soon as Lewis Davison signed the contract "under protest, under coercion because of illegal strike", Emery McCoy turned to the Committee and said, "Get the men back to work on the evening shift." The employees promptly returned to work. (188; 605-609)

It was admitted at the pre-trial conference and affirmed at the trial that District 17 was an agent of the UMW for the purposes of this case. (34; 583-4; 592; 354-7) It is clear, therefore, that District 17's officers and representatives, including R. R. Humphreys and Emery McCoy, were acting as agents of the UMW in 1964 and that UMW is responsible for their actions.[4]

This Court has held that the words "induce and encourage" in 8(b)(4) are "broad enough to include in them *every form of influence and persuasion.*" *IBEW* v. *NLRB* (1957) 341 U.S. 694, 701-02 (emphasis added)

On the basis of the substantial evidence summarized above, directly linking the UMW through its authorized agents with the 1964 strike, the District Judge properly found and concluded that:

> "The defendant in 1964 induced and encouraged individuals employed by the plaintiff to engage in a strike and a refusal to perform services for Riverton in the course of their employment and also threatened,

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4. For the relationship between UMW and its districts, see: *UMW* v. *Patton* (CA 4, 1954) 211 F. 2d 742, cert. den. (1954) 348 U.S. 824; *UMW* v. *Osborne Mining Co.* (CA 6, 1960) 279 F. 2d 716, cert. den. (1960) 364 U.S. 881; *Riverside Coal Co.* v. *UMW* (CA 6, 1969) 410 F. 2d 267, cert. den. (1969) 396 U.S. 846; *White Oak Coal Co.* v. *UMW* (CA 6, 1963) 318 F. 2d 591, cert. den. 379 U.S. 871 (1964).

coerced and restrained Riverton, as those words are used in 8(b)(4) (A) and (B)." (84, paragraph 4)

The Court of Appeals accepted and adopted these findings and this conclusion of the District Court in directing judgment for Riverton and Davison. (A-72a-73a)

The District Court found that, "During the term of the said 1964 agreement, Riverton was shut down again by a strike which began on April 12, 1966." (56) The Court also found that the 1964 contract "was in effect a no-strike contract", so the 1966 strike like that in 1964 was in breach of contract and also violated Section 8(d) of the Act. (59-60)

The District Court said, "With respect to the 1966 strike, there is no evidence in this case based on which this Court could say that the plaintiff has maintained the burden of proving by a preponderance that District 17, or the defendant, either authorized or ratified the 1966 strike at Riverton" (86, paragraph 6) and that the stoppage was not "concerned with the 80-cent clause or the Land Lease clause" although these were in the new contract which the UMW forced Riverton to sign as a condition of ending the 1966 strike. (57-58) As in 1964, Riverton "signed under express protest to the 80-cent clause based on the claimed illegality thereof." (56)

District 17 of the UMW asked the members of its Local 1209 to return to work but they did not do so until after the new agreement with the 80-cent clause was signed. (57-58) It was found that, "The defendant took no affirmative action, other than above described, to end the strike." (58) The District Court concluded, however, that this inaction did not constitute ratification or encouragement of the strike. The Court of Appeals explicitly rejected these findings of non-inducement or encouragement and stated

that they were "not supported by evidence and are clearly erroneous." (A-75a) The Court said that:

> "* * * UMW, having the power to correct the unlawful action of the Local union, and deciding to accept the benefit of it instead of taking appropriate action to halt the strike as it was required to do under the contract, thereby induced and encouraged both the 1964 and the 1966 strike." (A-75a)

It was pointed out that the 1966 contract "contained the illegal eighty-cent penalty clause" and that:

> "The only way Riverton could terminate the strike was to sign the 1966 amendment to the national contract, which it did under protest." (A-74a)

These conclusions of the Court of Appeals are clearly supported by the above findings and the findings of the District Court that "District 17's president had personal knowledge of" the 1966 strike at Riverton "and could have filed charges" against striking UMW members, but "took no affirmative action" other than a telegram calling them to return to work. (57-59) Also, Emery McCoy admitted that the Union never told the men that "Riverton already had a contract in existence" (412), although he attended the Local Union meeting at which a strike vote was taken. (410) The decision of the Court of Appeals on this point is consistent with that of the Fifth Circuit in *Vulcan Materials Co.* v. *Steelworkers* (CA 5, 1970) 430 F. 2d 446, in which that court likewise found inducement and encouragement by failure to take positive action. The Court there observed that:

> "Even though he [the International representative] may have advised Vulcan employees to return to work, he never took action which could reasonably have been expected to effectuate this end and thus

> can be said to have, at the very least, acquiesced in and condoned the illegal activity." (430 F. 2d at 457)

Accord: *Teamsters* v. *Humko* (CA 6, 1961) 287 F. 2d 231, cert. den. (1961) 366 U.S. 962.

The UMW was also responsible for the 1966 strike because of its control over and domination of its Locals, which have no real autonomy. (640-664; 436-444)

The 1966 strike is of minor importance in the case. The trial court, as stated above, concluded that the 1964 strike was Union authorized (85), that "the strike-force coercion threat was directly and primarily related to the 80-cent clause" and that:

> "A proximate result of the 80-cent clause to Riverton was to force it to cease dealing in the products of other producers of coal, i.e., producers who were not unionized." (84-85)

The Court held that the 1966 strike had nothing to do with the 80-cent clause (86) but that as a result of the initial insertion of the clause into the contract through coercive measures in 1964, if the clause is considered invalid the Respondents are entitled to recover damages for the entire period from April 1964 until September 1968. (86-87) Accordingly, all but $38,128.50 of the total damages found by the trial court to be appropriate were attributed to the 1964 strike. (88, subparagraph d; 86-87)

b. The UMW coercion had secondary objects.

The trial court dismissed the suit because it concluded that the "primary purpose" of the clauses "was work preservation." (84) The court said "the primary purpose for exacting the 80-cent clause bargain" was "to prevent subcontracting, preserve Riverton's employees' work, maintain union standards in the production of coal which could

just as well have been produced by Riverton and protect the integrity of the Welfare Fund." (85) Inconsistently, the District Court also found that, "The purchasing of coal by one producer from another is an essential marketing practice in the bituminous coal industry" and that, "It was customary for Riverton to buy supplemental coal in order to fulfill its contracts with buyers of coal." (40; also see paragraphs 10, 35) He found that Riverton had been purchasing about 40,000 tons a month (61), and that this coal was purchased because,

> "* * * Riverton 'could not financially put in any more coal mines.' Riverton's projected costs would have exceeded what it cost to acquire added coal through contracts with small operators, some union and some not, and some operating under subleases on land controlled by Riverton." (35, paragraph 9)

The District Judge further found that after the 1964 agreement was signed and Riverton ceased its purchases of coal from nonsignatories,

> "* * * Riverton was unable to make up its loss of volume of coal by purchase from other sources. Supplemental coal could not be acquired within a range of economic delivery at a price which Riverton could pay and realize a profit." (55-56, paragraph 40)

The District Court's obviously contradictory findings with respect to the "primary purpose" of the 1964 strike and the 80-cent and coal lands clauses have no material significance in view of his findings that in addition to the above-mentioned "primary" purpose, *the Union had certain other specific secondary objectives.* He found as a fact that "unionization of some non-union employers" was "foreseeable and in that sense was *a purpose* at the

time the clauses were negotiated." (84, paragraph 3, emphasis added) He also found that:

> "*Another object* of the said strike was to force or require Riverton and Davison to *cease using*, selling, handling, transporting or otherwise dealing in the products of coal producers who were not signatories to an agreement with the defendant Union and to *cease doing business* with such producers." (55, paragraph 39; emphasis added)

The District Judge also found that:

> "Another effect of the said strike was to encourage coal producers selling coal to Riverton or Davison to recognize or bargain with the defendant Union as the representative of the employees of such producers even though the defendant Union had not been certified as the representative of such employees under the provisions of Section 9 of the Act." (55, paragraph 39)

In addition, the District Judge specifically found that:

> "An object of the April, 1964, strike at Riverton was to force or require Riverton to enter into the proposed 1964 printed form amendment to the National Bituminous Coal Wage Agreement of 1950." (55, paragraph 39)

He found that:

> "A proximate result of the 80-cent clause [in the agreement] to Riverton was to *force it to cease dealing in the products* of other producers of coal, i.e., *producers who were not unionized.*" (84-85, paragraph 4; emphasis added)

The Court of Appeals relied upon the above findings of the District Judge in reversing and directing the entry

of judgment for the Respondents. (A-67a)[5] The Court of Appeals said:

> "* * * the District Court specifically found that 'an object' of the 1964 strike was to force Riverton to sign the agreement containing the eighty cent penalty clause. Another object was to compel Riverton and Davison to cease doing business with, and to cease using the products of, other coal producers who were nonsignatories. The foreseeable purpose of the eighty cent clause was 'the unionization of some non-union employers.'
>
> "It is clear that Section 8(b)(4) of the Act forbids strike action if 'an object' is to force an employer to do any of the things prohibited by Section 8(e). The statute does not mention primary object or purpose. If any object of the strike is forbidden by Section 8(b)(4), it is a secondary boycott. It is not necessary to find that it was the sole object." (A-70a)

The Court of Appeals also correctly concluded, on the basis of the above findings of the District Court, that:

> "* * * the supplemental coal which Riverton and Davison were purchasing from signatory and nonsignatory suppliers involved work which was never performed by their own employees. Riverton was operating at all times at full capacity, but because of lack of working capital and of mining equipment, it could not run additional mines, and it was necessary for Riverton to purchase coal to fill its orders." (A-71a)

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5. As the Court of Appeals relied on the findings of fact of the trial court, there was no violation of Rule 52. The only reversal of a trial court finding was with respect to union responsibility for the 1966 strike and there the Court of Appeals specifically found that the finding was "clearly erroneous" as provided in Rule 52(a). (A-75a)

The secondary objects quoted above which the District Judge found to exist are clearly forbidden objects under the wording of Section 8(b)(4) and required the Court of Appeals to reverse and direct entry of judgment for the Respondents. In drafting Section 8(b)(4), Congress expressly provided that a violation occurred whenever "*an* object" is one of the purposes listed in subparagraphs (A) through (D) of Section 8(b)(4). This Court has construed the phrase "an object" as meaning *any* object. In *NLRB* v. *Denver Building Trades Council* (1951) 341 U.S. 675, this Court, in applying Section 8(b)(4) and finding a violation thereof said:

> "It was *an* object of the strike to force the contractor to terminate Gould & Preisner's subcontract.
>
> "We hold also that a strike with *such an object* was an unfair labor practice within the meaning of §8(b)(4)(A).
>
> "*It is not necessary to find that the sole object of the strike was that of forcing the contractor to terminate the subcontractor's contract. This is emphasized in the legislative history of the section.*" (341 U.S. at 689; emphasis added)

Subsequently, in *NLRB* v. *Local* 825 *Operating Engineers* (1971) 400 U.S. 297, 27 L.Ed. 2d 398, this Court reaffirmed its support of the *Denver Building Trades* decision, observing that Local 825 was:

> "* * * using a sort of pressure that was unmistakably and flagrantly secondary. [Citing *Denver Building Trades Council*, supra]
>
> "The more difficult task is to determine whether *one* of Local 825's objectives was to force Burns and the other neutrals to 'cease doing business' with White

as §8 (b)(4)(B) *requires*." (400 U.S. at 304; emphasis added)

The Circuits likewise have followed the "an object" construction. In *NLRB* v. *Milk Wagon Drivers Local No. 753* (CA 7, 1964) 335 F. 2d 326, the court said:

> "It is well settled that one unlawful object is sufficient for a finding that §8(b)(4) has been violated, although there might be other lawful objects." (At 326)

Also, in *Retail Clerks Local 770* v. *NLRB* (CA D.C., 1961) 296 F. 2d 368, the court observed that:

> "* * * a strike may have several 'objects.' The term used in the statute is *an* object." (At 373; emphasis in original)

See also *NLRB* v. *New York Lithographers* (CA 3, 1967) 385 F. 2d 551.

Besides violating 8(b)(4)(B), the UMW, on the basis of the findings of the District Court, also violated Section 8(b)(4)(A). As stated, *supra*, the District Judge specifically found that "an object" of the UMW coercion was to force Riverton to sign an agreement containing the 80-cent and coal lands clauses. (55, paragraph 39) Section 8(b)(4)(A) makes it unlawful for a union to coerce an employer "to enter into any agreement which is prohibited by Section 8(e)." Section 8(e) forbids an agreement "*whereby* such employer ceases or refrains or agrees to cease or refrain from * * * dealing in any of the products of any other employer." (Emphasis added) The District Judge found that:

> "A proximate result of the 80-cent clause to Riverton was to force it to cease dealing in the products of other producers of coal, i.e., producers who were not unionized." (84-85)

Thus, the clauses in question were clauses "whereby" Riverton was forced to cease dealing in certain products and clearly violated 8(e), so that the coercion to obtain the clauses became a violation of 8(b)(4)(A).

c. Davison is a proper party.

The trial court found and concluded that:

> "Davison is an 'affiliate' of Riverton and as such is includible within the meaning of the word 'whoever' in 29 U.S.C. §187." (71)

The Court of Appeals concurred in this conclusion, stating:

> "In our opinion, Riverton and its parent corporation Davison are proper parties to bring the action." (A-78a)

The coal lands clause states that "this Agreement covers the operation of all the coal lands, coal producing and coal preparation facilities owned * * * by any * * * affiliate * * *." (608) The undisputed facts show that Riverton was Davison's wholly owned subsidiary, and that Davison owned coal lands and coal preparation facilities which it leased to Riverton. (102-103) In addition, Davison acted as Riverton's exclusive sales agent for all mined and purchased coal and received a sales commission of from 6% to 8%. (103) Some coal lands leased by Riverton from Davison were in turn leased by Riverton to non-signatory operators from whom Riverton purchased coal. (142; 693-729) In addition, Davison owned coal lands used by its subsidiary, Riverton. Davison also owned and operated the North Bend dock and coal preparation facility through which Riverton's coal was shipped. (104; 170-171; 312) The above undisputed facts amply justify the conclusion of both courts below that Davison was in fact an

"affiliate" of Riverton in Riverton's coal mining enterprises.

The 80-cent clause forced on Riverton by UMW coercion requires the payment of the 80-cent penalty "by each such Operator signatory hereto or by any subsidiary or *affiliate* of such Operator signatory hereto." (606-07; emphasis added) The coal lands clause asserted that "this Agreement covers the operation of all of the coal lands, coal producing and coal preparation facilities owned * * * by any * * * *affiliate* * * *." (608; emphasis added) The trial court correctly found, therefore, that the 80-cent penalty clause and the companion coal lands clause, "By their terms * * * made Riverton responsible for the payment of an 80-cent per ton penalty to the United Mine Workers fund on all coal purchased by Davison from non-signatories." (62)

As soon as the agreement was signed by Riverton, Davison's lands were automatically impressed with the burden of the 80-cent penalty. This would necessarily have a direct impact on Davison's sales commissions and on the value of its coal lands and coal preparation facilities leased to Riverton. Indeed, it was solely because of this impact of the 80-cent clause that Davison was compelled to stop performance on its contract with Ford Coal Company. (62-63; 87) A part of the damage award is attributable to this incident. (87, par. 8(a))

It is not easy to understand why the UMW has raised the Davison issue in this Petition. In an earlier NLRB proceeding, UMW's counsel admitted that the 80-cent clause was binding on an "affiliate" of Riverton. UMW's counsel stated, "We admit that that is the effect of the contract." (591-592)

The UMW argues that to be an "affiliate" an entity "must possess the characteristics that would permit it to be

an owner" or producer or operator of a coal facility and that Davison thus did not qualify. (Petition, 48) The UMW misreads the clause, which clearly states that "this Agreement covers the operation of all of the coal lands * * * owned or held under lease by [Riverton] * * * or by any * * * affiliate * * *." Therefore, if the land or facility is owned or operated either by Riverton or by Davison it is covered by the clause. (608)

2. The Court of Appeals Decision Does Not Conflict With Applicable Decisions of This Court.

a. There is no conflict with National Woodwork Manufacturers Association v. NLRB.

One of the decisions of this Court principally relied upon in the Petition is *National Woodwork Mfgrs. Assn.* v. *NLRB* (1967) 386 U.S. 612. (Discussed in the Petition at pages 36-39) The Petition says that a "classic guideline" of *National Woodwork* is the statement therein, "The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees' and stresses that "Section 8(e) was designed to condemn subcontracting clauses possessing secondary pressure characteristics." (Petition, page 37) Also, quoting from the decision of this Court, it is said that:

> "* * * whether a union-management agreement falls within the scope of Sections 8(e) and 8(b)(4) 'cannot be made without an inquiry into whether, under all the surrounding circumstances, the Union's objective was preservation of work . . . , or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere.' " (Petition, page 36)

Finally, reference is made to "*National Woodwork's* holdings that Section 8(e) is not subject to literalism (386 U.S.

619-25) and that the Act's Section 8(b)(4) is 'not to be read as supporting a construction of the statute *as prohibiting the incidental effects of traditional primary activity*' (p. 632)." (Petition, page 38)

In disposing of these contentions of the Petitioner, the Court of Appeals stated:

> "The trouble is that the clauses in question here were not 'addressed to the labor relations of the contracting employer [Riverton] vis-a-vis his own employees', but on the contrary, to the boycotted employers (non-signatory suppliers), *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612 (1967)." (A-71a)

Thus, far from disregarding the *National Woodwork* decision of this Court, the Court of Appeals actually applied the "classic guideline" in reversing the District Court and directing judgment for Riverton and Davison.

The situation here presented is quite different from that involved in *National Woodwork*. The challenged union conduct in *Woodwork* "related *solely* to preservation of the traditional tasks of the jobsite carpenters." (81-82; emphasis added) In the instant case, work preservation, if any object at all, was not the *sole* object.

In the instant case, the Court of Appeals correctly concluded, as noted elsewhere above, that, "* * * the supplemental coal which Riverton and Davison were purchasing * * * involved work which was never performed by their own employees" and that:

> "The eighty cent penalty clause was not directed at job security, because Riverton could comply therewith by closing its mines, discharging all of its employees, and filling its entire requirements with coal from other signatory mines. Furthermore, Riverton could purchase

coal from a signatory mine supplier whose employees were operating under substandard wages and working conditions." (A-71a)

In the instant case, unlike *Woodwork*, the District Court as well as the Court of Appeals specifically found that the UMW did have secondary objectives in forcing the 80-cent clause on the Respondents. Thus, our case does not involve merely "the incidental effects of traditional primary activity." Here, clearly, "the agreements and boycott were tactically calculated to satisfy union objectives elsewhere." Thus, instead of violating the *National Woodwork* decision, the decision of the court below adheres to and applies the standards laid down in the *Woodwork* case.

The *National Woodwork* decision disposes of another argument advanced by the Petitioner. The Petitioner has cited the proviso added to Section 8(b)(4)(B) in 1959 as authority for its position. (Petition, page 35) That proviso states "nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing." It is quite clear, however, that the above language, added in 1959, was not intended by Congress to change in any way the earlier decision of this Court in *Denver Building Trades, supra.* In discussing the proviso in *National Woodwork,* this Court stated that in the 1959 amendments:

> "The word 'concerted' in former §8(b)(4) was deleted to reach secondary conduct directed to only one individual. This was in response to the Court's holding in Labor Board v. International Rice Milling Co., 341 U.S. 665, 95 L.Ed. 1277, 71 S. Ct. 961, that 'concerted' required proof of inducement of two or more employees. But to make clear that the deletion was not to

> be read as supporting a construction of the statute as prohibiting the incidental effects of traditional primary activity, Congress added the proviso * * *." (386 U.S. at 632)

After the proviso was inserted, Congress took pains to make it clear that the proviso was not to affect in any way the construction of Section 8(b)(4)(B) given earlier by this Court in its *Denver Building Trades* decision, *supra*. The Conference Report stated:

> "The purpose of this provision is to make it clear that the changes in section 8(b)(4) do *not* overrule or qualify the *present* rules of law permitting picketing at the site of a primary labor dispute. *This provision does not eliminate, restrict, or modify the limitations on picketing at the site of a primary labor dispute that are in existing law. See, for example, NLRB v. Denver Building and Construction Trades Council, et al. (341 U.S. 675 (1951))* * * *" (Leg. Hist. of the Labor Management Reporting and Disclosure Act of 1959, Vol. 1, page 942; emphasis added)

Also, in Senator Goldwater's summary of the amendments of September 14, 1959, it is stated that:

> "[The proviso] does not eliminate, restrict or modify the limitations on picketing at the site of a primary labor dispute which were applicable prior to this amendment. *The rules laid down in certain decisions with respect to such picketing are still the law, as for example, in NLRB* v. *Denver Building and Construction Trades Council, et al.*, 341 U.S. 675 (1951) * * *." (Leg. Hist., *supra*, Vol. 2, page 1857; and see other citations to Legislative History set forth in footnotes 20 and 21 of *National Woodwork Mfgrs. Ass'n* v. *NLRB*, *supra*.)

What has been said above about *National Woodwork* also answers the Petitioner's contentions about *Fibreboard Paper Products Corp.* v. *NLRB* (1964) 379 U.S. 203 (Petition, pages 36-37). In *Fibreboard*, it was held that the contracting out of work is a subject of mandatory bargaining. *Fibreboard* did not qualify in any way the earlier decision of this Court in *Denver Building Trades, supra*, that union coercive conduct loses its protection if any object of such conduct is secondary, as in the instant case.

b. There is no conflict with the Coronado decisions.

The Petition at pages 41-44 cites as authorities this Court's two *Coronado* decisions. (*UMW* v. *Coronado Coal Co.* (1922) 259 U.S. 344 and *Coronado Coal Co.* v. *UMW* (1925) 268 U.S. 965) Principal reliance is placed on the "first *Coronado*" case which held that "Only the Board" of the International Union could ratify strike action of lesser union officials so as to make the International itself financially responsible. (259 U.S. 394, quoted in Petition at page 45) But this holding in "first *Coronado*" is inapplicable to an action brought under Section 303. Section 303, enacted in 1947, long after the *Coronado* decisions, states, in paragraph 303 (b), that suits under 303 are "subject to the limitations and provisions of section 301 hereof." Section 301(e), applicable under 303, states that:

> "* * * in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

The history of the above amendments is reviewed in *United Mine Workers* v. *Patton* (CA 4, 1954) 211 F. 2d 742,

cert. den. (1954) 348 U.S. 824, at pages 747-50. In *Patton*, the UMW made the same contention with respect to the *Coronado* cases that it has made in the instant case. (211 F. 2d at 747, fn. 1) In the *Patton* opinion, Senator Taft is quoted as stating that:

> "* * * this definition was written to avoid the construction which the Supreme Court in the recent case of United States against United Brotherhood of Carpenters placed upon section 6 of the Norris-LaGuardia Act which exempts organizations from liability for illegal acts committed in labor disputes unless proof of actual instigation, participation, or ratification can be shown. * * * *The conferees agreed that the ordinary law of agency should apply to employer and union representatives.*"

The Senator stated that:

> "* * * *union business agents or stewards, acting in their capacity of union officers, may make their union guilty* of an unfair-labor practice when they engage in conduct made an unfair-labor practice in the bill, *even though no formal action has been taken by the union to authorize or approve such conduct.*" (Leg. Hist. of LMRA, Vol. 2, page 1622, quoted in *Patton* at page 748; emphasis added)

In *Patton*, the Court held that the *Coronado* rule applied by the Supreme Court in the *Carpenters* case, *supra*, "was not adopted by the Labor Management Relations Act and that its application to suits under that act was expressly excluded by section 301(e) * * *." The Court added that:

> "The history of the Act shows clearly that the intent of Congress was to apply to suits of this character the common law rules with respect to liability for acts of an agent." (211 F. 2d at 747)

Both lower courts found that when Emery McCoy told the Union members that there was no contract, the statement was a "signal" for the employees to strike. Petitioner contends this finding violated *Coronado*. As *Coronado* is inapplicable the argument fails. Moreover, it is abundantly clear that such a knowing misrepresentation by a UMW District Representative constitutes *encouragement* to strike, which is all that is required for liability under Section 8(b)(4). The NLRB itself recognizes this elementary principle. In *Meat Cutters Local 421* (1949) 81 NLRB 1052, the Board stated:

> "A strike call may be given in forthright fashion, or informally in a manner which is understood by the initiated. *A strike may be as effectively signalled by a simple statement that an employer has refused to sign a collective bargaining contract when the union policy is 'No contract—no work,' as by a direct strike call from the union leadership to the union members of the failure to reach agreement on a new contract.*" (At 1057; Emphasis added)[6]

In advancing its *Coronado* argument, the Petitioner has also misconstrued and misapplied *UMW* v. *Gibbs* (1966) 383 U.S. 715 (cited in Petition at pages 21 and 44). In *Gibbs*, this Court explicitly held that under Section 303 "the responsibility of a union for the acts of its members

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6. Accord: *United States* v. *International Union UMW* (D.C. D.C., 1948) 77 F. Supp. 563, 566-67, aff. (CA D.C., 1949) 177 F. 2d 29, cert. den. (1949) 338 U.S. 871. *Lewis* v. *Benedict Coal Co.* (CA 6, 1958) 259 F. 2d 346, mod. on other gds. (1960) 361 U.S. 459; *United Textile Workers* v. *Newberry Mills, Inc.* (W.D. S.C., 1965) 238 F. Supp. 366, aff. (CA 4, 1963) 315 F. 2d 217, cert. den. (1963) 375 U.S. 818; *Pressmen's Local 17* v. *Oregonian Publishing Co.* (D.C. Ore., 1960) 188 F. Supp. 859, aff. (CA 9, 1960) 286 F. 2d 4, cert. den. (1961) 366 U.S. 912; *United States* v. *Railroad Trainmen* (N.D. Ill., 1951) 96 F. Supp. 428; *Vulcan Materials Co.* v. *Steelworkers* (CA 5, 1970) 430 F. 2d 446.

and officers is to be measured by reference to *ordinary doctrines of agency,* rather than the more stringent standards of § 6" of Norris-La-Guardia. (383 U.S. at 736; emphasis added) The Court held that Section 6 remained applicable to "state claims" whether or not "they are associated with *claims under § 303 to which the section does not apply.*" (383 U.S. at 737; emphasis added) The Court concluded that *Gibbs* was not to be decided under Section 303, but under state law and such finding, which removes *Gibbs* from the ambit of the instant case, explains the language from *Gibbs* quoted by the Petitioner.

c. There is no conflict with NLRB v. Truck Drivers Local 449.

The Petitioner cites *NLRB* v. *Truck Drivers Local No. 449* (1957) 353 U.S. 87 as holding that "multiemployer collective bargaining was permissive." That is no issue in this case. The trial court expressly found that Riverton "was not, in either year, a member of any 'multiemployer' bargaining group." (37)

The Petitioner's effort to justify its 80-cent clause on the basis of "the bituminous coal industry's history of collective bargaining" is erroneous. (Petition, page 36) In *UMW* v. *Pennington* (1965) 381 U.S. 657, this Court said, at 666:

> "But there is *nothing in the labor policy* indicating that the union and the employers *in one bargaining unit* are free to bargain about the wages, hours and working conditions of *other bargaining units* or to *attempt to settle these matters for the entire industry.* On the contrary, the *duty to bargaining unit by unit* leads to a quite different conclusion. *The union's obligation to its members would seem best served if the union retained the ability to respond to each bargain-*

ing situation as the individual circumstances might warrant, without being strait-jacketed by some prior agreement with the favored employers." (Emphasis added)

3. There Is No Conflict Between the Circuits on the Same Matter.

The decision of the Sixth Circuit in the instant case is the first and only decision in any Circuit in the country in a Section 303 damage action involving the validity of the UMW's 80-cent penalty and coal lands clauses. As pointed out by the Court of Appeals in its decision herein, the NLRB has considered the validity of the clause and has decided the question several different ways. (A-73a) The *NLRB* case has been considered by the Court of Appeals for the District of Columbia. (350 F. 2d 801; 399 F. 2d 977) Decisions in damage cases under Section 303 are decided by the Federal courts on their own facts, however, and are not controlled in any way by decisions in NLRB proceedings. In *International Longshoremen's Union* v. *Juneau Spruce Corp.* (1952) 342 U.S. 857, this Court held that Section 303 and 8(b)(4) provide separate and independent remedies. The Court said:

> "The fact that the two sections have an identity of language and yet specify two different remedies is strong confirmation of our conclusion that the remedies provided were to be independent of each other. Certainly there is nothing in the language of § 303 (a)(4) which makes its remedy dependent on any prior administrative determination that an unfair labor practice has been committed. Rather, the opposite seems to be true." (342 U.S. at 244)

Accord: *United Brick and Clay Workers* v. *Deena Artware, Inc.* (CA 6, 1952) 198 F. 2d 637, cert. den. (1952)

344 U.S. 897, rehearing den. (1953) 344 U.S. 199; *NLRB* v. *Deena Artware, Inc.* (CA 6, 1952) 198 F. 2d 845, cert. den. (1953) 345 U.S. 906; *Old Dutch Farms, Inc.* v. *Teamsters Local 584* (CA 2, 1966) 359 F.2d 598, 602-3, cert. den. (1966) 385 U.S. 832; *Old Dutch Farms* v. *Milk Drivers* (E.D. N.Y., 1968) 281 F. Supp. 971.

At the trial, it was admitted by all parties that the 80-cent penalty clause was drafted as a "substitute" for the union standards clause (PWC) which had been held invalid by the NLRB. *Raymond O. Lewis, et al.* (1964) 148 NLRB 249.[7] The Sixth Circuit has already found that the PWC was an agreement "to boycott coal not produced in conformity with the National Agreement." *Tennessee Consolidated Coal Co.* v. *UMW* (CA 6, 1969) 416 F. 2d 1192, 1198, cert. den. 379 U.S. 964.

Also, in *Pennington, supra*, Mr. Justice Goldberg, who before ascending the bench, was a union lawyer, stated in a footnote in his separate opinion that PWC "bristles with potential unfair labor practices." (381 U.S. at 708)

In any event, the trial court's assertion that "an admitted substitute is the equivalent of what it was substituted for" is a basic error. The validity of the 80-cent clause must be and has been determined on its own merits. It cannot be established by the mere fact that the clause is a "substitute" for PWC. It is a transparently false syllogism to state that if PWC is legal and the 80-cent clause is a substitute for the PWC, the 80-cent clause must be legal. The scheme and wording of each clause determines its own validity.

Riverton was never a party to the PWC case. It was a belated *amicus*, but had no opportunity to introduce evidence or to establish the facts about the PWC as ap-

7. The validity of the PWC is now before the Court of Appeals for the District of Columbia. *Dixie Mining Co.* v. *NLRB* Case No. 23,947.

plied to itself or any other company. The legality of the 80-cent clause as applied to Riverton cannot be determined by reference to the PWC litigation.

The effort of the Petitioner to develop conflicts between the instant decision and decisions of other Circuits on other questions likewise fails. The facts in *Teamsters Local 710* v. *NLRB* (CA D.C., 1964) 335 F. 2d 709 are significantly different from those in the instant case. The union was seeking fairly claimable jobs, held to be a legitimate primary objective, and this objective was not commingled, as in the instant case, with illegal secondary objectives. Hence, the decision is in no way inconsistent with that in the instant case.

There is no conflict between the instant decision and that in *Retail Clerks Local 770* v. *NLRB, supra.* There also, the sole objective of the union was to protect work which its own members had been performing inside the picketed stores. No secondary objectives were commingled.

Clearly, there is no conflict between the instant decision and decisions of other Circuits cited on pages 45-46 of the Petition holding in particular cases that particular local unions were not subordinate bodies of their International Union and were autonomous legal entities.[8] Each of these cases was decided on the basis of its own facts and the evidence of domination or lack of domination proffered by the parties. In the instant case, the Court of Appeals did not hold that the UMW was responsible for the actions of its Local solely because the Local was char-

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8. *Busby* v. *Electric Utility Employees' Union* (CA D.C., 1945) 147 F. 2d 865; *Morgan Driveway, Inc.* v. *Teamsters* (CA 7, 1959) 268 F. 2d 871; and *T. S. Ragsdale Co., Inc.* v. *Teamsters Local 509* (D.C. S.C., 1972) F. Supp. , 79 LRRM 2219. None of the above decisions involved the United Mine Workers Union.

tered by the International. Here, the controls in the UMW Constitution detailed in the evidence established that Local 1209 was not, in fact, an autonomous entity separate and distinct from the UMW, but instead was merely an administrative arm of the UMW dominated and controlled by the UMW. (640-664; 436-444) Also, there was direct evidence here of encouragement and coercion by admitted UMW agents. (Section 1a, *supra*)

The Sixth Circuit decisions referred to by the Petitioner turned on their own facts. *Harnischfeger Corp.* v. *Sheet Metal Workers* (CA 6, 1970) 436 F. 2d 351 did not involve the Mine Workers Union or its Constitution. In *Garmeada Coal Co.* v. *UMW* (CA 6, 1956) 230 F. 2d 945; (D.C. E.D. Ky., 1954) 122 F. Supp. 512, International Representatives took immediate and effective steps to end the strike in breach of contract which had been called by the President of the Local and gained no benefits from the strike itself. The trial judge found from the evidence "that these representatives of the Union did all that could reasonably have been expected of them in observing their duty to exercise their best efforts to maintain the integrity of the contract and to prevent the strike" and made "Urgent appeals to the men to discontinue their strike and return to their work." (122 F. Supp. at 518) The Court of Appeals, affirming, found "That the field agent made urgent appeals to the men to discontinue the strike and return to work." (230 F. 2d at 945) By contrast, in the instant case, Emery McCoy actively signalled the strike in 1964. In 1966, there is no evidence that the UMW did anything to end the strike other than to send one telegram.

> "The only way Riverton could terminate the strike was to sign the 1966 amendment to the National contract, which it did under protest. Upon signing it, the strike ended. UMW was successful." (A-74a)

The court said:

> "UMW did nothing to persuade its members to return to work other than to send them a telegram. It did not even tell them that they had a valid contract which was being violated by their work stoppage. It did not undertake to discipline the strikers. Its inaction was a form of influence and persuasion. On the other hand, UMW benefited by the strike and took advantage of that fact to get a new contract." (A-74a)

The Court concluded that:

> "* * * UMW, having the power to correct the unlawful action of the Local union [as set forth in its Constitution, 644] and deciding to accept the benefit of it instead of taking appropriate action to halt the strike as it was required to do under the contract, thereby induced and encouraged both the 1964 and the 1966 strike." (A-75a)

CONCLUSION

For the reasons stated above, the Petition for Certiorari should be denied. The Respondents also pray that they may have their costs expended herein.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1346

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

RIVERTON COAL COMPANY and
DAVISON FUEL AND DOCK COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1346

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

RIVERTON COAL COMPANY and
DAVISON FUEL AND DOCK COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO OPPOSITION BRIEF

I. UMW'S REPLY TO RESPONDENTS' STATEMENT OF THE CASE.*

Despite Respondents' charge in its opposition brief (p. 6) that UMW's statement "is laced with irrelevancies, misstatements of fact, expressions of opinion and significant omissions", UMW believes that comparison of the record with its Statement of the Case will disclose it to be both accurate and fair. On the other hand, critical omissions and inaccuracies in Respondents' statements and arguments prompt UMW's instant reply,

*Parties and pagination references are referred to herein as in the certiorari petition, except the abbreviation "J.A. " refers to pages in the Joint Appendix. The opposition brief is referred to as "O.B.___". *All emphases herein are supplied, unless otherwise indicated.*

although time permits UMW to point out only the most blatant examples thereof.

The opposition brief's statement concerning the 1964 strike and Agreement (O.B. 9-14) is to be compared with Petitioner's statement concerning the 1964 work stoppage (Pet. 16-22); Respondents' statement concerning the 1966 strike and Agreement (O.B. 14-16) is to be compared with that of Petitioner (Pet. 22-24), including the corroborative evidence furnished by the Bureau of Labor Statistics, United States Department of Labor, concerning the 1966 stoppage, *which Respondents ignore;* and the opposition brief's statement of the district court's decision (O.B. 19-21) is to be compared with Petitioner's statement of the district court's conclusion concerning the two work stoppages (Pet. 24-26).

Not only does Respondents' opposition brief assiduously avoid directing the Court's attention to numerous undisputed facts, including, but not limited to, the bituminous coal industry's history[1] of collective bargaining and its relevant economic facts (Pet. 9-11), UMW's historic efforts to preserve work opportunities for its members through contractual restrictions (Pet. 11-15), but also the district court's findings pertaining thereto (Pet. 9-15), as well as to many of the district court's findings and conclusions of law that PWC, the 80-cent

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[1]The district court affirmatively concluded that "the history of the union negotiations going back dozens of years (multiple and singular) which led to PWC and/or the 80-cent clause is relevant", avowing that "Any work preservation clause or any union standards clause will of necessity limit the right of an employer to deal with other employers or to handle their products" and "It is difficult to imagine such a clause which would not run afoul of 8(e)" [A. 47a (76)].

The Sixth Circuit was, as *insensitive* to the requirement of Rule 52(a), Federal Rules of Civil Procedure, that "Findings of fact shall not be set aside unless clearly erroneous" relating to the foregoing finding as it was as to all other district court findings pertaining to the validity of the challenged clauses in the 1964 and 1966 Agreements.

clause, and the coal lands clause of the 1964 and 1966 Agreements sought to protect the jobs and work of signatory employees and to maintain the Welfare Fund's integrity, and were permissive under the Act's 8(e).

The district court's findings and conclusions appear in the certiorari petition (pp. 13-16), to which reference is made. Though all of said findings and conclusions are cogent, crucially worthy of repetition are the district court's findings and conclusions that "neither PWC nor the 80-cent clause ran afoul of 8(e)"; that their purpose *clearly* was "to tackle in a successful way a legitimate problem of subcontracting and work preservation which had existed for decades and had been attacked for decades in unsuccessful contractual methods"; that a secondary effect of each clause "was the protection of the Welfare Fund—clearly a legitimate primary (in a labor sense) target"; that though a "secondary effect" was unionization of some non-union employers, it was "foreseeable and in that sense was a purpose at the time the clauses were negotiated"; and that the secondary purpose was an incident to the primary purpose, which was work preservation, and "obvious on the record that the unionization effect was a matter of choice, even to neutral employers", not a matter of compulsion [A. 55a (83-84)]. Specifically, with reference to Riverton, the district court concluded, *"On this record, one could only conclude that the 80-cent clause did exactly what it was designed to do—it resulted in the employer producing more with his own employees than he ever had before by substantial percentages"* [A. 55a (84)], noting "This record does not explain why financial ability to expand production (1964-65) was missing in 1962-63" [A. 13a (42-43)]. It agreed, too, there was nothing secondary about the coal lands clause [A. 44a (73)].

II. UMW'S REPLY TO RESPONDENTS' ARGUMENT THAT THE SIXTH CIRCUIT'S HOLDING CONCERNING THE CHALLENGED CLAUSES DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

A. Contrary To Respondents, the Sixth Circuit's Opinion Herein Conflicts With This Court's *National Woodwork*, And With Opinions Of the D. C. Circuit.

In contending the Sixth Circuit's opinion herein does not conflict with applicable opinions of this and other federal appellate courts (O.B. 24, 38, 45-50), Respondents ignore this Court's teaching in *Local 761, Electrical Workers* v. *NLRB*, 366 U.S. 667, 672, that the Act's secondary boycott provisions are not to be literally construed because such construction would "ban most strikes historically considered to be lawful, so-called primary activity". Therein, this Court cautioned that "Important as is the distinction between legitimate 'primary activity' and banned 'secondary activity,' it does not present a glaringly bright line" and that "The objectives of any picketing include a desire to influence others from withholding from the employer their services or trade" and it quoted, with approval, language from *Seafarers Int. Union* v. *NLRB*, D.C. Cir., 265 F.2d 585, 590, that " 'It is clear that, when a union pickets an employer with whom it has a dispute, it hopes, even if it does not intend, that all persons will honor' " the union's activity, including "employees of neutral employers".

In reversing the district court and directing judgment for Respondents, Respondents support the Sixth Circuit's action by an argument (O.B. 38-42) which ignores the district court's findings and conclusions that PWC, the 80-cent clause and the coal lands clause of

the 1964 and 1966 Agreements sought to protect the jobs and work of signatory employees and to maintain the Welfare Fund's integrity, and were permissive under the Act's Section 8(e), discussed in the certiorari petition (pp. 13-16).

Nor does Respondents' argument concern itself with *National Woodwork Mfgrs. Assn.'s*[2] admonishment to lower federal courts that determination whether Section 8(e) and Section 8(b)(4) is violated "cannot be made without an inquiry into whether, *under all the surrounding circumstances*, the Union's objective was preservation of work . . or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere" (386 U.S. 644). *Further, Respondents disregard UMW's charge of the Sixth Circuit's failure to inquire "whether, under all the surrounding circumstances, the Union's objective was preservation of work" when the district court's findings and conclusions that the challenged clauses were permissive under Section 8(e) were predicated upon undisputed facts relating to the bituminous coal industry's history of collective bargaining and its relevant economic facts, UMW's historical efforts to preserve work opportunities for its members through contractual restrictions, and UMW's achievement of the challenged clauses* (Pet. 9-15).

Moreover, Respondents were similarly unresponsive to UMW's answers (Pet. 37-38) to the Sixth Circuit's condemnation of the challenged clauses on the basis that "supplemental coal which Riverton and Davison were purchasing from signatory and nonsignatory

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[2]*National Woodwork Mfgrs. Assn.* v. *NLRB*, 386 U.S. 612 (1967).

suppliers involved work which was never performed by their own employees".

Because Respondents would deprecate (O.B. 48) UMW's citations of *Teamsters, Local 710* v. *NLRB*, D.C. Cir., 335 F.2d 709, 713-14 (1964) and *Retail Clerks Union, Local 770* v. *NLRB*, D.C. Cir., 296 F.2d 368, 374 (1961) on their assertion that therein secondary objectives were not commingled, it becomes important to reiterate that in support of its finding that the challenged clauses did not violate Section 8(e), the district court found that a secondary effect of each clause "was the protection of the Welfare Fund—clearly a legitimate primary (in a labor sense) target"; that though a "secondary effect" was unionization of some non-union employers, it was "forseeable and in that sense was a purpose at the time the clauses were negotiated"; *that the secondary purpose was an incident to the primary purpose, which was work preservation and "obvious on that record that the unionization effect was a matter of choice, even to neutral employers", not a matter of compulsion* [A. 55a (83-84)]. Specifically, with reference to Riverton, the district court concluded, *"On this record, one could only conclude that the 80-cent clause did exactly what was designed to do—it resulted in the employer producing more with his own employees than he ever had before by substantial percentages"* [A. 55a (84)], noting "This record does not explain why financial ability to expand production (1964-65) was missing in 1962-63" [A. 13a (42-43)]. It agreed, too, there was nothing secondary about the coal lands clause [A. 44a (73)].

Even if, as the Sixth Circuit declared (A. 71a), the coal "Riverton and Davison were purchasing from

signatory and nonsignatory suppliers involved work which was never performed by their own employees", nonetheless it involved work which Riverton's employees had the skills and experience to perform. *Teamsters, Local 710* recognizes that where the employees have the skills and experience to perform work claimed—as is true in the instant situation—even if the clause covered non-traditional work.

> "It would be difficult to deny that '[a] clause covering non-traditional work may be just as consecrated to the primary objective of bettering the lot of the bargaining unit employees and just as foreign to the congressional purpose for section 8(e) as those clauses involving only the work traditionally done within the bargaining unit'" (335 F.2d 714).

In addition to the quoted language in the certiorari petition (p. 38), *Retail Clerks* makes clear that when an employer "agrees in good faith to terms and conditions, he represents that if the employees accept and abide those terms they will have this employment. We think employees, even absent a specific anti-subcontracting provision, could enforce their right to the work contemplated by a bargaining agreement" (296 F.2d 373).

NLRB v. *Local 825, Operating Engineers*, 400 U.S. 297, 304, declared, "Some disruption of business relationships is the necessary consequence of the purest form of primary activity" and that "These foreseeable disruptions are, however, clearly protected", citing *United Steelworkers of America* v. *NLRB*, 376 U.S. 492, and *Local 761, Electrical Workers* v. *NLRB*, 366 U.S. 667, 682. These pronouncements are consonant with the recognition in *Teamsters, Local 710*, that "Thus the 'cease doing

business' language in §3(e) cannot be read literally because inherent in all subcontracting clauses, even those admittedly primary, is refusal to deal with at least some contractors" (335 F.2d 714).

B. The Sixth Circuit's Prior *Canada Dry Case* Conflicts With the Sixth Circuit's Opinion Herein.

Heretofore and *contrary* to the Sixth Circuit's rejection herein of UMW's "claimable work" contention, the Sixth Circuit's *Canada Dry Corp.* v. *NLRB*, 6 Cir., 421 F.2d 907 (1970), refused an employer's claim that a union sought "*work acquisition*", as distinguished from "*work preservation*", saying "these were the type of jobs which the clerks had traditionally done and for which they had the skills and experience" and that:

> "Although the tasks of initially handling and shelving the particular brand name products in issue had not been traditionally performed by the store clerks, we do not regard the clerks' claim to these jobs as representing in any realistic sense an attempt to . . acquire new job tasks" (p. 909).[3]

C. Contrary to Respondent-, UMW's Objectives Were Primary and Not Secondary, and the District Court So Found.

In urging upon this Court that UMW's coercion had secondary objects (O.B. 30-36), Respondents, in quoting from district court findings and conclusions, have *failed* to include other crucially relevant portions thereof.

Illustrative thereof: Respondents quote (O.B. 32) as follows:

> "*Another object* of the said strike was to force or require Riverton and Davison to *cease using*, sel-

[3]Notably, the Sixth Circuit's *Canada Dry* opinion affirms NLRB's holding. Additionally, the Sixth Circuit's *Canada Dry* opinion (p. 910) cites, with approval, NLRB's holdings in *Brentwood Markets*, 171 NLRB 1013 (1968) and *Cala Foods*, 172 NLRB No. 200, 69 LRRM 1189.

> ling, handling, transporting or otherwise dealing in the products of coal producers who were not signatories to an agreement with the defendant Union and to *cease doing business* with such producers",

that

> "Another effect of the said strike was to encourage coal producers selling coal to Riverton or Davison to recognize or bargain with the defendant Union as the representative of the employees of such producers even though the defendant Union had not been certified as the representative of such employees under the provisions of Section 9 of the Act",

and that

> "An object of the April, 1964, strike at Riverton was to force or require Riverton to enter into the proposed 1964 printed form amendment to the National Bituminous Coal Wage Agreement of 1950",

but *Respondents carefully avoid directing this Court's attention to paragraph 39's additional language, reading:*

> "After Riverton signed the 80-cent clause, and as a result thereof, some fifteen non-union producers from which Riverton had been buying supplemental coal became signatories to the UMW agreement. Some twenty-two did not—*so the effect was not to 'force' or 'compel' but to encourage. Such 'encouragement' was not a primary object of the strike—it was a recognized incident. The design or purpose or object remained—job protection*" (A.25a).

Similarly, Respondents quote (O.B. 32) from the district court's conclusion as follows:

> "A proximate result of the 80-cent clause [in the agreement] to Riverton was to *force it to cease*

> *dealing in the products of other* producers of coal i.e., *producers who were not unionized*",

but again Respondents are careful not to apprise this Court that the district court's conclusion continued with the following language:

> "*While these were proximate results and foreseeable effects, none of them, nor the collection of them, constituted the primary purpose for exacting the 80-cent clause bargain. That was to prevent subcontracting, preserve Riverton's employees' work, maintain union standards in the production of coal which could just as well have been produced by Riverton and protect the integrity of the Welfare Fund*" (A.56a).

Respondents' admission (O.B. 32-33) that the Sixth Circuit "relied upon the above findings of the District Judge in reversing and directing the entry of judgment for the Respondents" clearly demonstrates the applicability of UMW's reliance upon "claimable work" and the authorities cited by it in support of its contention.

A basic error of Respondents in pressing upon this Court that UMW is guilty of secondary objectives is their ignoring that to be guilty of a Section 8(b)(4) violation, there is a positive necessity that the condemned conduct relate to a concomitant banned objective. *Local 1976, Carpenters* v. *NLRB*, 357 U.S. 93, 98 (1958). The discussion herein has demonstrated that Section 8(b)(4)(i)(ii)(A)'s objective is permissive under *National Woodwork*. Similarly, *Houston Insulation Contractors Assn.* v. *NLRB*, 386 U.S. 664 (1967), holds that collective activity of employees of a primary employer, the objective of which is to affect labor policies of that employer *is protected primary activity* under the Act's Section 8(b)(4)(B) and "*A boycott cannot be-*

come secondary because engaged in by primary employees not directly affected by the dispute."

D. UMW's Response to Respondents' Claim "There is No Conflict Between the Circuits"

Arguing the Sixth Circuit's decision to be "the first and only decision in any Circuit" in a Section 303 damage action involving the validity of the UMW's 80-cent and coal land clauses (O.B. 46), Respondents concede the District of Columbia Circuit's concern with the 80-cent clause in *Lewis* v. *NLRB*, 350 F.2d 801 (1965) and *Int. Union, UMWA* v. *NLRB*, 399 F.2d 977 (1968). Though arguing the district court's assertion that "an admitted substitute is the equivalent of what it was substituted for" to be a basic error (O.B. 47), Respondents do not deny that their Dan S. Davison was an intervenor in *Int. Union, UMWA* v. *NLRB*, D.C. Cir., 399 F.2d 977, 980, and that the District of Columbia Circuit's reference to "everyone's admission and our characterization a substitute for the union standards clause" (meaning PWC) included Respondents' Davison. Nor do Respondents challenge UMW's certiorari petition statement (Pet. 31-34, 39) that pursuant to the District of Columbia Circuit's indicia, NLRB has declared the validity of PWC and the 80-cent clause as permissive under Section 8(e). Further, if, as the Sixth Circuit quoted, NLRB "has not been consistent in its rulings on either the 80-cent or the PWC clause" (A. 73a), neither has the Sixth Circuit been consistent with reference to PWC, since in both *Lewis* v. *Pennington*, 400 F.2d 806, 814 (1968). cert. den. 393 U.S. 983, reh. den. 393 U.S. 1045, and *Ramsey* v. *UMW*, 416 F.2d 655 (1969), reversed on other grounds 401 U.S. 302, the Sixth Circuit has validated PWC.[4]

In any event, as UMW asserts in its petition (pp. 31-34), NLRB has sanctioned the challenged clauses' validity pursuant to the District of Columbia Circuit's indicia which condemned the Sixth Circuit's preference for NLRB's prior decisions, and, as the certiorari petition (p. 40) pointed out, such preference conflicts with this Court's *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) that "The administrative interpretation of the Act by the enforcing agency is entitled to great deference".

The foregoing discussion demonstrates the Sixth Circuit's reversal of the district court's findings and conclusions pertaining to the Act's Section 8(e) resulted from its failure to recognize UMW's contention of "claimable work", to its willingness *to segregate* portions of such findings and conclusions rather than premise its decision on them *in their entirety*, and by its preference of adopting NLRB decisions which the District of Columbia Circuit *rejected* rather than accepting NLRB's validation thereof.

Furthermore, since UMW's objectives were primary and not secondary, UMW could not have violated Section 8(b)(4)(i)(ii)(A) and (B), by reason whereof the district court appropriately dismissed the action and complaint, just as NLRB did upon validating the 80-

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[4]While the Sixth Circuit's *Tennessee Consolidated Coal Company* v. *UMWA*, 416 F.2d 1192, 1198, found PWC "to boycott coal not produced in conformity with the National Agreement" (O.B. 47), its finding related to a jury finding as to an antitrust violation. While the district court sanctioned the jury finding, its belief that PWC was valid is expressly reflected in its statement that, "If this Court were sitting as a trier of the facts in the present case, it would make the same findings of fact on the present record as it made upon the record in the *Ramsey* case"—wherein it found PWC valid—and that its approval of the jury verdict "does not indicate . . the Court concurs in the verdict" (See petition for certiorari, Case No. 1163, October Term, 1969, styled *UMWA* v. *Tennessee Consolidated Coal Company, et al.*, Appendix, pp. 50a and 58a, and 416 F.2d 1199).

cent clause in *Int. Union, UMWA* (76 LRRM 1396, fn. 12). Had the Sixth Circuit pursued prior important decisions and principles of this Court, the D. C. Circuit and NLRB, *and indeed the principles accepted by it in its own Canada Dry case,* and had it followed the command of Rule 52(a), Federal Rules of Civil Procedure, it would have approved the district court's findings and conclusions with reference to the challenged clauses and UMW's objectives. Its failure so to do has resulted in the Sixth Circuit's conflict therewith, thereby inviting this Court's award of certiorari herein.

III. UMW'S REPLY TO RESPONDENTS' ARGUMENT THAT UMW COERCED RIVERTON AND DAVISON, AND THAT THERE IS NO CONFLICT WITH THE *CORONADO* CASES.

The 1964 Work Stoppage.

Facts and the district court's findings and conclusions with respect to the 1964 stoppage, found in the certiorari petition (pp. 16-22), in the Sixth Circuit's holdings with reference thereto (Pet. 27-29) and argued therein as a predicate for this Court's award of certiorari (Pet. 40-43), are to be compared with facts (O.B. 9-14), district court findings (O.B. 19-21), the Sixth Circuit's holdings with reference thereto (O.B. 21-22) and argument (O.B. 25-30) with respect to the 1964 stoppage, found in Respondents' opposition brief.[5] *Relevantly, UMW directs the Court's attention that the district court found the 1964 stoppage's design, purpose or object remained "job protection"* (A. 25a).

The 1966 Work Stoppage.

Facts and the district court's findings and conclusions

[5]UMW concedes its error pointed out by Respondents (O.B. 26, fn. 3) that the word in the quoted language therein is properly "in" rather than "not", as stated in the certiorari petition (p. 22).

with respect to the 1966 stoppage, found in the certiorari petition (pp. 22-26) and the Sixth Circuit's holdings relating thereto (Pet. 29-30) and argued therein as a predicate for the award of certiorari herein (pp. 43-47), are to be compared with facts (O.B. 14-16), district court findings (O.B. 20), the Sixth Circuit's holdings relating thereto (O.B. 21) and argument (O.B. 28-30) with respect to the 1966 work stoppage, found in Respondents' opposition brief.

Even if District 17 is a UMW agent, UMW submits that Respondents' assertion (O.B. 27), "It is clear . . that District 17's officers and representatives, including R. R. Humphreys and Emery McCoy, were acting as agents of the UMW in 1964 and that UMW is responsible for their actions" is a *non sequitur*, and UMW's discussion (Pet. 40-43) is a challenge to Respondents' statement (O.B. 27), "On the basis of the substantial evidence summarized above, directly linking the UMW through its authorized agents with the 1964 strike, the District Judge properly found and concluded that" UMW "in 1964 induced and encouraged individuals employed by the plaintiff to engage in a strike and a refusal to perform services for Riverton in the course of their employment and also threatened, coerced and restrained Riverton, as those words are used in 8(b)(4)(A) and (B)" (O.B. 27-28).

Contrary to Respondents' claim that "There is no conflict with the *Coronado* decisions" (O.B. 42), UMW's certiorari petition (pp. 41-45), dealing with the 1964 and 1966 work stoppages and UMW's non-responsibility therefor, demonstrates the Sixth Circuit's conflict with *UMWA* v. *Coronado Coal Co.*, 259 U.S. 344, and *Coronado Coal Co.* v. *UMWA*, 268 U.S. 295; and nothing in Respondents' brief (pp. 42-43) differs from UMW's basic

position that in a Section 303 action the ordinary rules pertaining to the law of agency obtain.

Respondents' opposition brief (pp. 42-45) is totally silent concerning UMW's charge that the Sixth Circuit's opinion conflicts with *Walters* v. *Int. Assn. of Plumbers*, 6 Cir., 323 F.2d 578, which rejected a judgment against a parent organization because

> "There is no evidence . . that [the parent organization] participated in any way in the placing of the picket or ratified the picketing".

Nor is there Respondent contention of the inapplicability of *Harnischfeger Corp.* v. *Sheet Metal Workers*, 6 Cir., 436 F.2d 351 (1970)—a Section 303 action—which approved district court findings as *"not clearly erroneous"*, which held, *inter alia*, "the International Union did not authorize the picketing" and "the international representative did not assert or claim to assert authority to terminate the picketing" (436 F.2d 356).[6]

Since Respondents premise UMW's responsibility for the 1964 work stoppage on the conduct of Emery McCoy, District 17's field representative (O.B. 10-11), the Court's attention is directed to the Fourth Circuit's *United Construction Workers* v. *Haislip Baking Co.*, 223 F.2d 872, which, in contrast to Respondents' claim herein, rejected the doctrine of imputed liability for the acts of a regional director and field representatives on the ground that they did not have implied authority to

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[6] *Harnischfeger* noted instances of a parent labor organization's being held liable where it "engaged in a joint enterprise with a local or responsible for the activities of the local and its agents", or "when the International admitted having joined the local in authorizing the general conduct", or "when the International through its constitution or bylaws or by some other means commanded or required the activities resulting in the unfair labor practices", or "when the International controlled the operations of the local" (436 F.2d 356).

Unrefuted evidence herein is that neither District 17 nor UMW had anything to do with the stoppage (J.A. 439).

adopt, on the parent union's part, a "wildcat" strike conducted by a local union. Thus, UMW submits that its cited authorities, and particularly its discussion of *Coronado* (Pet. 44-45) in relation to the work stoppages and UMW's responsibility therefor, are apposite herein.

Respondents' cited authorities to support their contention that when Emery McCoy told union members there was no contract, the statement was a "signal" for strike action (O.B. 44, fn. 6), are discussed below:

Though *U. S.* v. *Int. Union, UMW*, DC, D.C., 1948, 77 F.Supp. 563, aff'd. D.C. Cir., 177 F.2d 29 (1949), held a functioning union to be responsible for its members' mass action, the instant case differs totally from the factual situation therein where, in an industrywide stoppage, *the district court found the parent union (UMW) responsible because it had provoked the strike.* There is neither plaintiff contention nor district court finding that in the instant case UMW authorized, participated in, or ratified the 1964 stoppage so as to render applicable *U. S.* v. *Int. Union, UMW*. Moreover, the mass action theory may not be considered as a statement of principle in isolation from the factual situation, but must be treated as cognate to the finding therein that UMW had devised "a new method of avoiding responsibility" by means of a "nod, or a wink, or the use of a code in order to call a strike". *First Coronado* rejects the mass action theory, avowing responsibility "is a mere question of actual agency" (259 U.S. 395).

Moreover, in *U. S.* v. *Int. Union, UMW*, DC, D.C., 1950, 89 F.Supp. 179, the district court, though recognizing the mass action doctrine, *refused to apply* it, even though, as herein, UMW failed to revoke local union charters but, as herein, instructed its members to return

forthwith to work and there was an absence that strike benefits had been used to aid striking miners.[7]

Respondents misconceive (O.B. 44-45) UMW's purpose in citing *UMW* v. *Gibbs*, 383 U.S. 715 (1966) [Pet. 21, 44] which was in fact responsive to the Sixth Circuit's holding that UMW "did not undertake to discipline the strikers" and "Its inaction was a form of influence and persuasion". UMW pointed (Pet. 44) to *Gibbs'* holding that "*There can be no rigid requirement that a union disavow strike activity which it had not authorized.* UMW likewise directed attention (Pet. 44) to Mr. Justice Harlan's concurrence in *Gibbs* that *a union's failure "to take affirmative action to dispel misconduct are not in themselves proof of authorization or ratification of the wrongdoing"* (p. 743).

Relevantly, just as the opposition brief contains no response to the *Gibbs* quotations, the same is true of UMW's quotation (Pet. 44) from *Int. Ladies Garment Workers Union* v. *NLRB*, D.C. Cir., 237 F.2d 545, 552, which cites *first Coronado* (259 U.S. 395) as support for its holding that there is no need for disavowing misconduct by a party which has not initiated or participated therein and that "silence provides no rational basis for inferring" UMW acquiesced in the stoppages.

Lewis v. *Benedict Coal Co.*, 6 Cir., 259 F.2d 346 (1958) [modified on other grounds, 361 U.S. 459 (1960)] did not involve the doctrine of "mass action" but made clear that "wildcat" strikes could not serve as a predicate for a parent union's liability. *Benedict's* inapplicability is emphasized by the fact that it did not concern, as does the instant case, unrefuted evidence affirmatively demon-

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[7]Subsequently, the District of Columbia Circuit in *U. S.* v. *Int. Union, UMW*, 190 F.2d 865 (1951) dismissed the action as "moot".

strating efforts to have Riverton employees return and continue to work (J.A. 1065-69), and uncontradicted evidence that strike action was voluntary on the part of Riverton employees (Pet. 16, *et seq*).

These same factors emphasize the inapplicability of *Vulcan Materials Co.* v. *Steelworkers*, 5 Cir., 430 F.2d 446 (1970), where the Fifth Circuit declared "It is equally clear that the Unions, through their agents, induced and encouraged the Vulcan employees to refuse to report to work . ." (p. 456).

Similarly inapposite is the Fourth Circuit's *United Textile Workers* v. *Newberry Mills, Inc.*, 315 F.2d 217 (1963), cert. den. 375 U.S. 818 (1963), where the union contended the stoppage was a "wildcat" strike, undertaken without union sanction and actively opposed by it, its issue was whether the union could enforce arbitration of discharged employees engaged therein; *and the Fourth Circuit held the employer's "argument against arbitration cannot prevail" and the union was exonerated of liability.*

Notably, while the certiorari petition (p. 43) observed the district court's characterization of the two McCoys' testimony as "less than candid", the certiorari petition pointed to this Court's *C. & O. Ry. Co.* v. *Martin*, 283 U.S. 209, 219-20, that:

> "It is not proper to submit uncontradicted testimony to a [factfinder] for the sole purpose of giving the [factfinder] an opportunity to nullify it by discrediting the witness, when nothing more than mere interest in the case exists upon which to discredit such witness . ."

and the Tenth Circuit's *Browning* v. *Crouse*, 356 F.2d 178, expresses it thus:

> "Unimpeached, positive testimony may not be disregarded, even though adduced from interested witnesses, *and no question of credibility or issue of fact is presented for determination by a trier of fact*".

Significantly, Respondents' opposition brief makes no challenge of the relevancy of these cases, nor is it responsive to Petitioner's citations of *Moore* v. *C. & O. Ry. Co.*, 340 U.S. 573, 578, that "Speculation cannot supply the place of proof" and *Pennsylvania R. Co.* v. *Chamberlain*, 288 U.S. 333, 340-41, which precludes the use of inferences as proof where there is "uncontradicted testimony of unimpeached witnesses . . that the fact sought to be inferred did not exist".

UMW submits Respondents' contention that the Sixth Circuit's decision presents no conflict with *Coronado* is erroneous and should be rejected.[1]

UMW's certiorari petition (p. 46), challenging the Sixth Circuit's reversal of the district court's exoneration of UMW for the 1964 and 1966 stoppages, notes the Sixth Circuit's failure to dispute a single finding upon which that exoneration was based, including the district court's corroboration by the United States Department of Labor (Pet. 24). *Since, as the certiorari petition (pp. 22-24) shows, the Bureau of Labor Statistics is corroborative of UMW's position and the district court's findings and conclusions that "With respect to the 1966*

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[1] Since Respondents' opposition brief directed attention that the Sixth Circuit found the 1964 contract "'was in effect a no-strike contract', so the 1966 strike like that in 1964 was in breach of contract and also violated Section 8(d) of the Act" (O.B. 28), it is crucial that the Court note the district court's declaration that the instant action was not one for breach of contract under the Act's Section 301 [A. 30a, 57-58a (60, 86)] and, further, the district court declared that, concerning the "no-strike contract", its findings "had no effect on the decision of this Court" [A. 30a (60)]. Indeed, *neither in pleadings, the evidence nor in arguments did the issue of no-strike contract or violation of Section 8(d) arise.*

strike, the district court concluded 'there is no evidence . . based on which this Court could say' plaintiffs maintained the burden of proving by a preponderance that 'District 17, or the defendant, either authorized or ratified the 1966 strike at Riverton' and that 'There is certainly no connection whatever between the 80-cent clause in either the 1964 or 1966 contract and the 1966 strike'" (Pet. 25-26), *it becomes significant that Respondents' opposition brief contains no response thereto.*

Respondents attempt to support the Sixth Circuit's reversal on the basis that the district court's findings of non-inducement or encouragement were "not supported by evidence and are clearly erroneous" by pointing to the Sixth Circuit's holding that by UMW's failure to correct the local union's alleged "unlawful action" and an acceptance of benefits in lieu thereof, UMW "thereby induced and encouraged both the 1964 and the 1966 strike", and that the only way Riverton could terminate the [illegible] to sign the 1966 Agreement, which it did under protest (O.B. 29).

But, failure to take corrective action is not a judicial requisite, as UMW's certiorari petition (pp. 45-47) has abundantly shown, and as the district court in *U. S.* v. *Int. Union, UMW*, D.C., D.C., 1950, 89 F.Supp. 179, recognized (*ante*, p. 10). Moreover, Respondents' citation of *Teamsters* v. *Humko*, 6 Cir., 387 F.2d 231, is answered by UMW's showing (Pet. 43) that the Sixth Circuit's *Harrischfeger* pointed out that *Humko* "relied in part upon the provisions of the international union's constitution in finding that the international participated as a 'principal actor' in the secondary boycott there in question" (436 F.2d 353). Indeed *Humko* emphasizes that the international union exercised a degree of dominion over the local union, depriving it of that degree of inde-

pendence associated with autonomous organizations (287 F.2d 242), *a situation which is totally dissimilar herein.*

Contrary to Respondents' contention that UMW was responsible for the 1966 stoppage "because of its control of and domination of its Locals, which have no real autonomy" (O.B. 30, 48), *under UMW's Constitution, local union officers are elected by secret ballot of local union members and are paid from dues allocated to a local union pursuant to UMW's Constitution* (J.A. 424, 440). *Regular local union meetings are scheduled pursuant to by-laws of local unions; and special meetings are called either by the local union's president or members thereof who request the calling of such special meeting* (J.A. 616-64, 424, 440, 444).[9]

Respondents' effort to dissipate UMW's contention that the Sixth Circuit's holding concerning Local 1209 conflicts with *Harnischfeger* and other cited cases (Pet. 46; O.B. 48, fn. 8), on the premise, as Respondents stated that "None of the above decisions involve the" UMW *is not of juridical relevance.* The Sixth Circuit, the Court will recall, grounded UMW responsibility for the stoppages on the theory that "Local 1209 was not an autonomous labor organization *separate and apart for UMW*" and "an administrative arm" thereof and was supervised, dominated and controlled by UMW (A. 75a). Yet, each of the cited cases, including the Sixth Circuit's *Harnischfeger* and *Garmeada Coal Co.* v. *UMW*, DC, E.D. Ky., 1954, 122 F.Supp. 512, aff'd. 6 Cir., 230 F.2d 945, judicially proclaim a local union is a legal entity apart from its parent international organization.[10]

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[9] Respondents' citations (O.B. 30) do not support their allegation of UMW's control over and domination of its locals (J.A. 640-64, 436-44) but, to the contrary, support UMW's position of local union autonomy.

[10] See Appendix A hereto for "Additional Findings and Conclusions" in the district courts' *Garmeada.*

Respondents seek to disarm this Court by asserting "The 1966 strike is of minor importance in the case" (O.B. 30). It admits nonetheless that the Sixth Circuit included in its award of damages $36,128.50 as attributable to the 1966 strike. Hence UMW challenges Respondents' characterization of the 1966 strike as "of minor importance".

The foregoing discussion emphasizes UMW's reasons (Pet. 47) for the award of certiorari herein.

IV. UMW'S REPLY CONCERNING THE SIXTH CIRCUIT'S FAILURE TO FOLLOW RULE 52(a), FEDERAL RULES OF CIVIL PROCEDURE.

UMW's certiorari petition (p. 40) complains that the Sixth Circuit's reversal of district court findings that the challenged clauses were permissive under the Act's Section 8(e) conflicts with Rule 52(a), Federal Rules.

Respondents undertake to avoid such failure on the ground that the Sixth Circuit "relied on the findings of fact of the trial court" (O.B. 33, fn. 5); but, as already shown (*ante*, pp. 8-10), those findings were wholly incomplete and thus did not meet the Rule's requirements that "Findings of fact shall not be set aside unless clearly erroneous".

At variance with the Sixth Circuit's action herein, it implemented the Rule's mandate in *Harnischfeger* (436 F.2d 356).

V. UMW'S REPLY TO RESPONDENTS' CLAIM THAT DAVISION IS A PROPER PARTY.

UMW's certiorari petition (pp. 47-49) contains its position that the Sixth Circuit holding that Davison is a proper party plaintiff is erroneous. UMW believes its

discussion therein suffices as an appropriate answer to Respondents' contrary claim (O.B. 36-38).

CONCLUSION

For the reasons assigned in its Petition for Certiorari and herein, UMW (Petitioner) prays that the Petition for Writ of Certiorari should be granted and that the Writ issue to review the judgments and opinion of the United States Court of Appeals for the Sixth Circuit entered January 21, 1972, in Cases Nos. 71-1021 and 71-1022, as set forth in said Petition. UMW (Petitioner) intends to urge each of the questions presented, even if not specifically argued in its Petition or herein.

Respectfully submitted,

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June 1, 1972

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

GARMEDA COAL COMPANY, *Plaintiff*

vs. No. 615

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, *et al., Defendants*

Filed; Aug. 5, 1954

ADDITIONAL FINDINGS AND CONCLUSIONS

This cause coming on to be heard upon the motion of the plaintiff for additional Findings of Fact and Conclusions of Law, and the Court having heard arguments presented by counsel for the respective parties and being advised sustains the plaintiff's motion and states Findings and Conclusions in addition to those set out in the Opinion filed herein on July 20, 1954, as follows:

FINDINGS OF FACT

1. The strike involved in this case was called by Jake Abbott, President of Local Union No. 6130.

2. Local Union No. 6130, in calling the strike by its president, did not act and was not authorized to act as an agent for the International Union of United Mine Workers of America or for District 19 thereof and had no authority whatever from the International Union or District 19 to call the strike or participate therein.

3. The Local Union, as such, did not sign any of the contracts alleged to have been violated and, as such, was not a party thereto.

4. The Local Union, as such, had no part in the negotiations leading up to or in the consummation of the bargaining agreement herein alleged to have been breached.

5. The International Union of United Mine Workers of America and the Local Union No. 6130 of United Mine Workers of America and District 19 thereof did not together constitute a single entity and did not bear such relation to each other that the acts of the Local were the acts of all three of them, and the act of the Local by engaging in the strike here in question was not the act of the defendant International Union or District 19 of the United Mine Workers of America.

CONCLUSIONS OF LAW

1. The relationship existing between the International Union and the Local were somewhat analogous to the relationship of a parent corporation to its subsidiary, but considered as a whole the relationship of the Union and the Local "is sui generis and simply will not fit into any of the traditional legal pigeonholes." Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation, 210 F.2d 623, 628, C.A. 3. Such relationship is not sufficient to render the International Union liable for unauthorized acts of the Local.

2. Under the constitution of the International, the Local is in many respects an autonomous entity without power or authority to act for or bind the International in respect to calling or promoting a strike in violation of a bargaining agreement entered into by the International.

3. The Local, not having been a party to the bargaining agreement alleged to have been violated herein, is not liable for breach of such contract nor for any damages arising therefrom.

/s/ H. Church Ford
Judge

August 5, 1954

UINTED STATES OF AMERICA
EASTERN DISTRICT OF KENTUCKY } *ss:*

I, Davis T. McGarvey, Clerk of the United States District Court for the Eastern District of Kentucky, do hereby certify that the annexed and foregoing is a true and full copy of the original ADDITIONAL FINDINGS AND CONCLUSIONS filed August 5, 1954 in the case of GARMEDA COAL COMPANY, as plaintiff vs. INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, et al., as defendants, Civil Action No. 615-London Docket now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at London, Ky. this 16th day of January, A. D. 1958.

Davis T. McGarvey, *Clerk.*
By Bessie M. Greene, *Deputy Clerk.*